TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 485

RAYMOND P. WARD, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 10, 1959

CERTIORARI GRANTED OCTOBER 19, 1959

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[fol. a]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

RAYMOND P. WARD, Plaintiff,

vs.

ATLANTIC COASTLINE RAILROAD COMPANY, A VIRGINIA CORPORATION, Defendant

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL—Filed April 30, 1957

1. Plaintiff, Raymond P. Ward, residing in Volusia County, Florida, by and through his undersigned attorneys, sues the defendant, Atlantic Coastline Railroad Company, a Virginia Corporation, and alleges:

2. On or about May 22, 1954, plaintiff was an employee of the defendant at Chiefland, Levy County, Florida. Defendant was operating a railroad in interstate commerce and plaintiff was performing work for and on behalf of defendant within the scope of his employment, which said employment was in the furtherance of interstate commerce. This action arises under the laws of the United States, Title 45, Chapter 2, U.S.C.A., Section 51, et seq. The amount in controversy exceeds $3,000, exclusive of costs.

3. At said time and place plaintiff was engaged in the work of repairing railroad track and was doing the work of a common section hand. While engaged in such work for and on behalf of defendant within the scope of his employment, plaintiff received serious and permanent injury to his person as a direct and proximate result of the negligence of the defendant.

4. Plaintiff alleges that the defendant did so negligently [fol. b] (a) fail to provide a safe place for plaintiff to work, or, in the alternative

(b) fail to provide adequate personnel to assist plaintiff in doing heavy lifting of crossties and leaving them into position underneath the rails, or, in the alternative

(c) fail to properly instruct plaintiff as to safe methods of doing heavy lifting and heaving heavy crossties into position, or, in the alternative

(d) require plaintiff to do heavy and dangerous lifting in a rapid and unsafe manner without furnishing adequate personnel to assist him or without giving him any instructions as to safe methods of lifting heavy objects, or, in the alternative

(e) employ an unsafe method of placing ties under the rails, which defendant knew, or in the exercise of reasonable care should have known, would probably result in injury to plaintiff, or, in the alternative

(f) fail to provide first aid treatment for plaintiff or to provide transportation to his home or to a place where he could obtain help while he was suffering from an obviously painful, dangerous, and disabling injury, thereby forcing plaintiff to walk approximately 1½ miles while in such condition, which said act or omission of defendant caused Plaintiff further injury or aggravated the serious injury from which he was suffering. Plaintiff further charges that such acts of the defendant were done negligently, carelessly, or deliberately and wilfully, and all of which the defendant knew, or in the exercise of reasonable care should have known, would probably result in further injury to him or would aggravate his said serious injury, or, in the alternative

(g) fail to provide adequate medical treatment for plain-[fol. c] tiff after it had undertaken to provide such medical treatment, in that the defendant, its agents, servants, or employees negligently and carelessly failed to provide safe or proper or adequate treatment, or did so wilfully and carelessly and negligently treat him that his condition was made worse and aggravated as a result of said treatment, or, in the alternative

(h) fail to conduct itself properly in the discharge of its duty to plaintiff;

that as a direct and proximate result of such negligent acts or omissions, plaintiff was permanently disabled.

5. Plaintiff alleges that as a direct and proximate result of such negligence he received great and permanent injury to his person, including but not limited to his back and nervous system; and that among his said injuries he sustained a severe sprain to his back and a herniated intervertebral disk and other injuries not yet diagnosed; all of which injuries are disabling and permanent, and his nervous system has been greatly and permanently injured and damaged as a result of said negligence. Plaintiff has in the past, and will in the future, suffer a loss of earnings or profits, and his over-all earning capacity has been greatly diminished; he has been rendered less able to provide a home for himself and his family, and to enjoy a normal life; he has in the past, and will in the future, suffer great physical pain and mental anguish, emotional instability, and physical disability, and personal handicaps; because of his injuries plaintiff has in the past, and will in the future, incur liability for large sums of money for medicine, hospitals, doctors, nurses, x-rays, and other medical care and attention.

Wherefore, plaintiff, Raymond P. Ward, sues the defendant for compensatory and punitive damages and de-
[fol. d] mands judgment in the sum of $350,000 and demands a trial by jury of all issues trialable as of right by a jury in this action.

Hector, Faircloth & Rutledge, Attorneys for Plaintiff, 835 duPont Building, Miami 32, Florida. By Earl Faircloth.

[fol. e] IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER TO GAINESVILLE DIVISION—Filed May 20, 1957

Comes now the Defendant, Atlantic Coast Line Railroad Company, by its undersigned attorneys, and shows unto the Court that the cause of action here sued upon, according to the fact of the Complaint, occurred at Chiefland in Levy County, Florida, in the Northern District of Florida.

Defendant would further show unto the Court that all witnessess, including medical and professional witnesses,

reside at or near Gainesville, Florida, as will appear from an affidavit of Charles Cook Howell, Advisory Counsel for the Atlantic Coast Line Railroad Company, filed simultaneously herewith, reference to which is made for a more detailed statement of the factual situation supporting this motion. Said affidavit is incorporated in this motion as fully as if set forth.

Defendant would further show that Gainesville, Florida, as set forth in said affidavit, is the nearest point at which the United States District Court sits to the place where the accident occurred, and that Levy County is within the jurisdiction of the United States District Court for the Northern District of Florida.

Wherefore, the premises considered, this Defendant moves the Court for an order transferring this case from the Miami Division of the Southern District of the Gainesville Division of the Northern District of Florida, in the interests of justice and for the convenience of the parties.

[fol. f] Dixon, DeJarnette, Bradford & Williams, Attorneys for Defendant, 908 Ainsley Building, Miami 32, Florida. By (Not Legible)

Certificate of Service (omitted in printing)

Affidavit of Charles Cook Howell in Support of Motion

Charles Cook Howell, being duly sworn, deposes and says:

I am Advisory Counsel for the Atlantic Coast Line Railroad Company, the defendant in the above captioned suit. As much I am in charge of directing the investigation of all accidents involving said defendant and the defence of all suits arising therefrom.

Defendant is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Virginia and has its legal principal office at Richmond, Virginia, and its principal operating office at Wilmington, North Carolina. It is a common carrier of passengers and

freight for hire and operates a line of railroad extending from Richmond, Virginia and Norfolk, Virginia, the Northern terminal of its railroad, to various points in a southerly direction through the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama.

[fol. g] As appears from the complaint, this action is brought by plaintiff to recover damages in the amount of $350,000.00 for alleged personal injury; loss of earnings and for doctors and nurses hire, hospital and related medical expenses incurred and to be incurred in the future by plaintiff on account of injuries alleged to have been sustained by him while allegedly in the employ of the defendant on or about May 22, 1954, at Chiefland, in Levy County, Florida.

That the investigation of the accident which allegedly caused said injuries was conducted under the general direction of this affiant and he knows of his own knowledge the witnesses whose testimony will be required by the defendant to properly present its defenses to this suit.

That said accident took place more than 300 miles from Miami, Florida, where this suit is pending; that as alleged in his complaint plaintiff is a resident of Volusia County, Florida; that neither plaintiff nor a single witness to be called by either party resides in Miami, Florida, or within the jurisdiction of this court; that in the trial of this case the defendant Atlantic Coast Line Railroad Company will need to call no less than ten (10) witnesses, all of whom, except one, reside in Gainesville, Florida, or within a radius of forty (40) miles of Gainesville, Florida; that witness Dr. F. L. Fort resides in Jacksonville, Florida, approximately seventy (70) miles from Gainesville, Florida, by highway; that all of such witnesses reside more than three hundred (300) Miles from Miami where this case is pending.

That four of the witnesses to be called by defendant are professional men who will be greatly inconvenienced in attending the trial of this case at Miami, far removed from their general practice of medicine, whereas they could readily attend a trial of this case at Gainesville, Florida, [fol. h] without any serious impairment to their practice.

Other witnesses who are not in the employ of this defendant would also be seriously inconvenienced by attending the trial of this case at Miami, whereas their inconvenience

in attending a trial of this case at Gainesville, Florida, would be slight.

Moreover, this defendant could not compel those professional and non-professional witnesses by the service of summons to attend a trial at Miami, Florida, since they reside beyond the jurisdiction of this Court. And this affiant respectfully avers that the defendant would be deprived of its legal rights if it were not permitted to have its witnesses confronted by the jury.

That this affiant is of the opinion that the increased out-of-pocket expense to the defendant incident to the trial of this case at Miami, over and above the cost of trying this case at Gainesville, would be at least $1,000.00 in extra wages, hotel bills, food, traveling and other incidental expenses.

That the cause of action here sued upon took place in Levy County, Florida, which is within the jurisdiction of the United States District Court for the Northern District of Florida.

Upon information and belief this affiant is of the opinion that the docket of the United States District Court for the Northern District of Florida, Gainesville Division, is less congested than the docket of this court, and that in the event of transfer to that jurisdiction this action could there obtain a fair, impartial and speedy trial.

Whereupon this affiant respectfully avers that in the interest of justice and for the convenience of the parties and of the witnesses this case should be transferred to the United States District Court for the Northern District of [fols. i-k] Florida, Gainesville Division.

s/ Charles Cook Howell.

Sworn to and subscribed before me this 17th day of May, 1957.

s/ R. N. Getty, Notary Public, (Seal). My Commission expires: January 12, 1958.

[fol. l] IN UNITED STATES DISTRICT COURT

ORDER TRANSFERRING CASE TO GAINESVILLE DIVISION—
June 27, 1957

This Cause came on to be heard before me, upon Motion of the defendant to transfer this cause to the District Court of the United States, in and for the Nothern District of Florida, Gainesville Division, and the Court having heard argument of counsel and being otherwise duly advised, it is hereupon

Ordered and adjudged that the said Motion be, and the same is hereby, granted; and it is further

Ordered and adjudged that the said cause be, and the same is hereby, transferred to the District Court of the United States, in and for the Nothern District of Florida, Gainesville Division.

Done and ordered at Miami, Florida, this 27th day of June, A.D., 1957.

s/ Emett C. Choate, District Judge.

[fol. m] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 22, 1957

The Defendant for answer to the compliant says:

First Defense

1. Defendant denies that Plaintiff was performing work for and on behalf of Defendant within the scope of his employment, as alleged in paragraph two (2) of the complaint herein, for in fact at the time of the alleged injury complained of, Plaintiff was engaged in "off duty employment" making repairs to a privately owned, maintained and operated railroad siding. Defendant admits each and every the remaining allegations contained therein.

2. Defendant admits that at said time and place Plaintiff was engaged in the work of repairing a railroad tract and was doing the work of a common section hand, as alleged in paragraph three (3) of the complaint herein, but denies each and every the remaining allegations contained therein.

3. Defendant denies each and every allegation contained in paragraph four (4) of the complaint herein.

4. The Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph five (5) of the complaint herein.

Second Defense

5. Any injuries sustained or suffered by the Plaintiff at the time and place alleged in this complaint were caused solely by the negligence or fault or want of care on the part [fols. n-o] of Plaintiff, and not by any negligence or fault or want of care on the part of this Defendant.

Third Defense

6. Any injuries sustained or suffered by the Plaintiff at the time and place as alleged in his complaint were caused in part or were contributed to, by the negligence or fault or want of care on the part of Plaintiff.

Lazonby, Dell, Graham & Willcox, By Sam T. Dell, Jr., Attorneys for Defendant, Baird Office Building, Gainesville, Florida.

Certificate of Service (omitted in printing)

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

Civil #269

RAYMOND P. WARD, Plaintiff,

vs.

ATLANTIC COASTLINE RAILROAD COMPANY, A VIRGINIA CORPORATION, Defendant

Gainesville, Florida, December 3rd, 1957.

Before: Honorable DOZIER A. DEVANE, United States District Judge

Transcript of trial proceedings—December 3, 4, 5, 1957

APPEARANCES:

Earl Faircloth, Esq., of Hector, Faircloth & Rutledge, 835 duPont Bldg., Miami, Florida, Attorneys for Plaintiff.

S. T. Dell, Esq., and L. William Graham, Esq., of Lazonby, Dell, Graham & Wilcox, Gainesville, Florida, Attorneys for Defendant.

[fol. 2] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Plaintiff ready in this case?

Mr. Faircloth: Plaintiff is ready, Your Honor.

The Court: Defendant ready?

Mr. Dell: It is, Your Honor.

The Court: Call a jury Mr. Marshal and Mr. Clerk.

(A jury of eleven selected, impaneled and sworn)

The Court: Let the record show that it is Stipulated that counsel for the respective parties agree to try this case with eleven jurors.

Do you desire the rule invoked in this case?

Mr. Faircloth: We desire the rule invoked at this time.

The Court: Call your witnesses, Mr. Faircloth. Call witnesses for both parties if they are outside.

[fol. 3] (Witnesses called and sworn)

The Court: Plaintiff may be seated. Mr. Dell are any of these witnesses representing the Coastline that you need excused?

Mr. Dell: Mr. J. L. Kennedy sitting over here.

The Court: He is the official representative of the Coastline?

Mr. Dell: With the Ocala Division.

The Court: I will have to excuse him. The remainder of you will have to remain outside while the case is being tried. And don't discuss this case with one another while you are out there waiting to be called and particularly don't tell anybody else what happened in the Court room when you were on the witness stand. You will all retire, please, and be handy when you are called.

(Witnesses out of Court room)

Mr. Faircloth would you like to make an opening statement?

Mr. Faircloth: I would, Your Honor.

[fol. 4] The Court: You may proceed, sir.

(Opening statement by Mr. Faircloth for plaintiff)

The Court: Mr. Dell would you like to make an opening statement?

Mr. Dell: Yes, Your Honor.

(Opening statement by Mr. Dell for defendant)

The Court: We are going to take a ten minute recess and when we come back have your first witness on the stand, Mr. Faircloth.

After recess the following proceedings were had:

Mr. Raymond P. Ward was first witness, having previously been sworn, testified as follows:

Direct examination.

By Mr. Faircloth:

Q. Would you state your full name, please sir?
A. Raymond Prescott Ward.

[fol. 5] The Court: You must talk loud enough for all those jurors over there to hear you. And so this old hard-of-hearing Judge can hear you too.

Mr. Faircloth Continuing:

Q. We want everybody to hear you. Where do you live Ray?
A. At the present time?
Q. Yes?
A. In Madison, Florida.
Q. All right, and where were you living in 1954?
A. Chiefland, Florida.
Q. In the month of May, 1954?
A. Yes sir.
Q. And what were you doing at that time?
A. I was employed by the Atlantic Coastline Railroad.
Q. In what capacity were you employed?
A. As apprentice foreman on the section group.
Q. Who was your boss?
A. I. H. Keene.
Q. I. H. Keene?
A. Yes sir.
[fol. 6] Q. How many members of this section crew did you have?
A. Four besides myself.
Q. Who were these men?
A. I. O. Thomas, Frank Richardson, A. B. Brown, and Jesse McBride.
Q. All right, you and Mr. Keene and these men that you just mentioned made up the section crew, is that right?
A. Yes sir.
Q. What all did you all do as the section crew there?
A. Well, we maintained tracks, we put in, replaced the ties, kept the right-of-ways clean, general maintenance work.

The Court: You had a certain section of a certain number of miles to keep in running order?
A. Yes sir.

Mr. Faircloth Continuing: Thank you, Judge.

Q. Was that just the main line?
A. No sir.

Q. What else did it include beside the main line?
[fol. 7] A. All the sidetracks.
Q. Privately owned sidetracks too?
A. Yes sir.
Q. You had a duty to maintain those sidetracks too?
A. Yes sir.
Q. Why do you say that?
A. The Rule Book of the railroad says that as part of the job, as part of the section crew's job to maintain them.
Q. Did you have a Rule Book?
A. Yes sir.
Q. They gave it to you when you started to work?
A. Yes, sir.
Q. What is an apprentice foreman? Were you learning to be a foreman?
A. Yes sir.
Q. And they gave you a Rule Book?
A. Yes, sir.
Q. Is this a book like the book they gave you when you started to work there as an apprentice foreman?
[fol. 8] A. Yes sir.
Q. Are you familiar with those rules?
A. Some of them, yes sir.

Mr. Faircloth: Your Honor, this book was produced voluntarily by Mr. Dell here.

The Court: We don't need the whole book in evidence. That has got everything in it.

Mr. Faircloth: Yes sir. I want to read a sentence or two from it if I may, Your Honor.

The Court: You want to introduce in evidence a sentence or two?

Mr. Faircloth: That is right.

The Court: All right. You can have it marked and you can have it identified as that part you want to read and show it to Mr. Dell and I think he will agree to your reading it.

Mr. Faircloth: All right, sir.
[fol. 9] Pages 152 and 198 marked

PLAINTIFF'S EXHIBIT NO. 1, ATLANTIC COASTLINE RAILROAD COMPANY RULES OF THE OPERATING DEPARTMENT.

Mr. Faircloth: Your Honor, I refer first to rule 722 on page 152.

The Court: All right, now let Mr. Dell see that. Have you any objection to it being read in evidence?

Mr. Dell: I would like to read it, Your Honor.

Mr. Faircloth: And also, Your Honor, Section 1045, Section 1046, on page 198 and Rule 1056 on page 201.

The Court: All right.

Mr. Dell: I have no objection, Your Honor.

The Court: All right, read it right in the record. State what that book is for the benefit of the record.

Mr. Faircloth: Thank you, Judge.

[fol. 10] The Court: Then read the rules you have just indicated.

Mr. Faircloth: Rule 722 reads, in part:

"In all cases of personal injury—I am sorry, it is 721.

Mr. Dell: No objection.

Mr. Faircloth: 721, Your Honor.

"When passengers or employees are injured, everything must be done to care for them properly. If they are able to be moved, they should be taken for treatment to the nearest local surgeon; if not, the nearest local surgeon should be called. If the case is urgent and the local surgeon is not available, the conductor, agent or employe in charge is authorized to call the nearest surgeon available to administer first-aid and care until the local surgeon can take charge."

On page 198, Section 1045:

"Section Foremen will report to the roadmaster."

And No. 1046:

[fol. 11] "They will have charge of maintenance of their assigned sections, and are responsible for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds. They must direct the work of

employes under their supervision and see that they perform their duties properly."

And Rule 1056, again under the head of Section Foremen:

"They must render prompt assistance in case of accidents."

Q. Now, Ray, you said that you were there with that crew and your general activity during the week was to maintain the main line track and private tracks and all those leading into the main line track, is that correct?

A. Yes sir.

Q. Well now, on May 22nd, 1954—do you remember what day of the week that was?

A. It was on Saturday.

Q. All right, were you working that day?

A. I don't quite understand.

Q. I said, did you work that day?

A. Yes sir.

[fol. 12] Q. Well now, where did you work?

A. On the McKenzie siding.

Q. Where?

A. At Hardee Town.

Q. In Hardee Town?

A. Yes sir.

Q. How did you happen to be working out there?

A. Because Mr. Keene told me to go ahead and work on it.

Q. When did he tell you?

A. Well, I knew it sometime before that and he reminded us Friday afternoon.

Q. Just what did he tell you on Friday afternoon, if you remember?

A. Well, his exact words I don't remember. That we were to report to the tool house at regular work time.

Q. The next day?

A. Saturday morning.

Q. Anything said about pay?

A. He said we would draw over-time.

Q. For the next day's work?

A. Yes sir.

Q. Did he ask you whether you wanted to work tomorrow

[fol. 13] or not?

A. No sir.

Q. He told you to be there?
A. Yes sir.
Q. You said you had knowledge of that before this Friday afternoon, didn't you?
A. Yes sir.
Q. How did you gain any such knowledge as that?
A. From a statement Mr. Keene made.
Q. And what was that?
A. That Mr. Sanders had told him we had to repair this particular siding.
Q. Mr. Sanders?
A. Yes.
Q. Do you know who Mr. Sanders was?
A. He was the roadmaster.
Q. Where was he?
A. His office is in Perry.
Q. Well, did you know who he was at the time that Mr. Keene mentioned it to you?
A. Yes sir.
Q. You knew he was Keene's boss?
A. Yes sir.
[fol. 14] And that he was over your section crew?
A. Yes sir.
Q. All right, on Saturday morning did you report for work?
A. Yes sir.
Q. Where did you report?
A. To the tool house.
Q. Where did you usually report?
A. At the tool house.
Q. And who was there?
A. Mr. Keene and the other members of the section crew.
Q. These men that you mentioned awhile ago?
A. Yes sir.
Q. They were all there?
A. Yes sir.
Q. What time was it?
A. Just before 7:00 o'clock.
Q. What time did you usually report to work out there?
A. Just before 7:00 o'clock.
Q. You went on to work?
A. Yes sir.

Q. Upon that siding?

[fol. 15] Yes sir.

Q. Did you carry any tools?

A. Yes sir.

Q. What kind of tools did you carry?

A. Our Coastline tools that we used every day work.

Q. Did you get them out of the Coastline tool house?

A. Yes sir.

Q. The same tools you had been using all week?

A. Yes sir.

Q. Had you already made your forty hours?

A. Yes sir.

Q. So you went on up there and started to work?

A. Yes sir.

Q. Tell the Court and Jury what you were doing out there?

A. Replacing cross-ties, the old ties that had rotted out, taking those out and replacing with new ties.

Q. Were there quite a few new ones to be replaced?

A. Quite a few, yes sir.

[fol. 16] Q. Can you estimate the number?

A. I couldn't, no sir, estimate the number.

Q. All right, what were you doing, specifically?

A. Well, I was doing the same as everyone else. I had a set of tools, digging out old ties and replacing with new ties.

Q. Well now, what do you mean when you say a "set of tools"?

A. A shovel, pair of tie hooks, lightening bar, and spike bar.

Q. The same as you used every day in the week?

A. Yes sir.

Q. And you were putting in ties?

A. Yes sir.

Q. Was Mr. Keene there?

A. Yes sir.

Q. Was he showing you what to do?

A. Yes sir.

Q. As he did every day in the week?

A. Yes sir.

Q. Was there anyone else around there telling you what to do?

[fol. 17] A. No sir.

Q. Did you know Mr. D. P. McKenzie?

A. I knew him, yes sir.

Q. Well, was he out there?

A. No sir.

Q. Did you know Mr. Perry Fugate?

A. Yes sir.

Q. Was he out there?

A. No sir.

Q. Do you think Mr. Fugate or did you know Mr. Fugate had anything to do with that siding out there?

A. No sir.

Q. Did you know Mr. Lee Watson in Chiefland?

A. Yes sir.

Q. Was he out there?

A. No sir.

Q. Did you know at that time that he had anything to do with that sidetrack?

A. No sir.

Q. Do you know Mr. Velma Hires of Chiefland?

A. Yes sir.

Q. Was he out there?

A. No sir.

[fol. 18] Q. Did you know at that time that he had anything to do with that sidetrack?

A. No sir.

Q. The only people out there were you and Mr. Keene and those four colored men, is that right?

A. Yes sir.

Q. Just like they had been all week?

A. Yes sir.

Q. Doing the same thing that you had been doing?

A. Yes sir.

Q. With the same tools?

A. Yes sir.

Q. All right. Now, did you get hurt that day?

A. Yes sir.

Q. Will you tell the jury how you got hurt and what you were doing when you got hurt?

A. Well, I had took out the old tie and cut my bed and put the new tie, turned around and reached out and hooked the tie and when I looked back to see how the tie was going and snatched it something popped.

Q. Now, do I understand that you straddled it, reached over and hooked it and put it between your legs, is that correct?

A. Yes sir.

[fol. 19] Q. Did I describe it correctly?

A. Yes sir.

Q. Was it necessary to get your head low enough to see that hole you were putting the cross-tie in?

A. Yes sir.

Q. You had to get your head down low enough to see what you were doing?

A. Yes sir.

Q. And this first lick you made there, your back popped?

A. Yes sir.

Q. Did you try to throw it again?

A. Yes sir.

Q. Did you move it?

A. No sir.

Q. All right. Now, is that the way you had been doing that for sometime?

A. Yes sir.

Q. Who told you how to do that?

A. Mr. Keene.

Q. Did he show you himself?

A. I can't remember, specifically, but I think, yes.

[fol. 20] Q. Is that the way the other men were doing it?

A. Yes sir.

Q. You had never been shown any other way to do it?

A. No sir.

Q. Had two of you ever worked on one tie, together?

A. No sir.

Q. Always one man?

A. Yes sir.

Q. Was that part of your duty in learning to be a foreman?

A. I guess so.

Q. That is what Keene told you to do, wasn't it?

A. Yes sir.

Q. And you were out there to do what he told you?

A. Yes sir.

Q. Well now, when this back—you said it popped?

A. Yes sir.

Q. What then happened what did you do?

A. I tried to move the tie again and I couldn't. Then [fol. 21] I laid the tie hooks down and walked over to Mr. Keene and told him that I had hurt my back and I felt like I should go to the house.

Q. All right now, wait a minute. Where was Mr. Keene?

A. He was down the track there. I don't remember exactly how far.

Q. Would it be as far as across this Court room?

A. Not that far, no sir.

Q. Was it closer than from here to the corner of that courtroom?

A. Yes sir.

Q. Standing out there?

A. Yes sir.

Q. Was he doing anything?

A. Just watching what was going on.

Q. All right now, you went up to him and told him that you had hurt your back and you thought you had better go in?

A. Yes sir.

Q. And what did he say?

A. He said, "well, do what you want to, if you think [fol. 22] you ought to go in, just do what you want to".

Q. All right, what did you do?

A. Well, I felt like I should go in and I walked from there to the house.

Q. Were you bent over, in a bent over position at the time?

A. Yes sir.

Mr. Dell: If the Court please, I object to counsel leading him.

The Court: You are testifying too much, Mr. Faircloth.

Mr. Faircloth: I am sorry, your Honor.

Mr. Faircloth Continuing:

Q. What was your position at the time?

A. I was in a bent-over position at the time.

Q. Were you in that condition when you asked Mr. Keene?

A. Yes sir.

Q. Were you in that condition when you walked away from the job?

A. Yes sir.

Q. Did you have your car there, or anything?

[fol. 23] A. No sir.

Q. No means of transportation?

A. No sir.

Q. How far was it to your house?

A. Approximately a mile.

Q. And did you walk that mile?

A. Yes sir.

Q. Did you have any trouble?

A. Quite a bit, yes sir.

Q. Now, about what time of the morning was it when you got hurt?

A. I would say about 9:00 o'clock.

Q. About what time was it when you got home?

A. I would say between 10:30 and 11:00 o'clock.

Q. Was anybody home when you got there?

A. My wife.

Q. What did you do when you got home?

A. I went in and went to bed and asked her to call the doctor.

Q. And did she?

A. Yes sir.

Q. And did the doctor come?

A. Yes sir.

[fol. 24] Q. What was his name?

A. Dr. C. M. Parnell.

Q. Do you know what time he got out to see you?

A. Not exactly, no sir, but around noon.

Q. Well, did he do anything for you?

A. He punched around and told me to get some kidney plasters, I believe he said.

Q. Kidney plasters?

A. Yes sir.

Q. Did you get any kidney plasters?

A. My wife got some kind of back plasters, kidney plaster, or something.

Q. Did that help you?

A. No sir.

Q. Did you stay in the bed the rest of that day?

A. Yes sir.
Q. Did you see Mr. Keene anymore that day?
A. Yes sir.
Q. Where?
A. When he came to the house.
Q. Do you remember what time he came to the house?
A. Not exactly, no sir.
[fol. 25] Q. Was it morning or afternoon?
A. It was afternoon.
Q. In the afternoon?
A. Yes sir.
Q. All right, what was the purpose of his coming?
A. He came to pay me for the time I had made.
Q. And he paid you?
A. Yes sir.
Q. How did he pay you?
A. In cash.
Q. And how much did he pay you?
A. I am not sure of the amount but I think about $4.00 and a few cents.
Q. Did he pay you the time and a half he promised you?
A. Yes sir.
Q. And what was your regular wage at that time with the Coastline?
A. Approximately $1.50 an hour.
Q. And he paid you time and a half on that?
A. Yes sir.
Q. Well, what happened after that, did your back get all right?
[fol. 26] A. No sir.
Q. Did you go back to see Dr. Parnell?
A. No sir.
Q. What did you do about it?
A. I came to Gainesville Monday morning to Dr. Manchester.
Q. And what did he do for you?
A. He gave me treatments.
Q. Did they help you?
A. At the time they were being applied, yes sir.
Q. Well, did you come back and see Dr. Manchester?
A. Yes sir.
Q. How often?

A. Every other day.

Q. For how long?

A. Approximately three weeks.

Q. Well, did you go back to work then?

A. I tried to, yes sir.

Q. Did you go see Mr. Keene about going back to work?

A. Yes sir.

Q. How did that come about?

[fol. 27] A. Mr. Keene told me if I would come back he would, you know, try to look out for me and give me a break.

Q. All right, about how long after you were hurt was it that you went back?

A. Approximately three or four weeks.

Q. Well, did he look out for you?

A. No sir.

Q. What happened when you went back to work?

A. The first morning he put us to unloading government gasoline, fifty-five gallon drums of gasoline.

Q. Did he have two men on a drum?

A. Yes sir.

Q. Were you able to do that?

A. No sir.

Q. How long did you work?

A. I don't know exactly.

Q. Did you make a full day?

A. No sir.

Q. Well, did you ever work with Mr. Keene anymore after that?

A. No sir.

Q. Did you ever work for the railroad anymore after that?

[fol. 28] A. Yes sir.

Q. Tell me how that came about?

A. Mr. Sanders transferred me to Gulf Hammock.

Q. Mr. Sanders, he was at Perry, was he?

A. Yes sir.

Q. He transferred you to Gulf Hammock to a section crew?

A. Yes sir.

Q. As an apprentice foreman?

A. Yes sir.

Q. Who was your boss down there?

A. T. C. Pittman.

Q. All right now, about what month was it that you were transferred to Ocala, if you recall?

A. To Ocala?

Q. To Gulf Hammock?

A. Sometime in July.

Q. Did you make it all right then?

A. My back still bothered me.

Q. Were you putting ties in as you were when you got hurt?

A. I don't believe we put in any ties down there.

Q. Well, did you finally get all right?

[fol. 29] A. No sir.

Q. Tell the jury what happened?

A. I continued working and tried to work around until approximately the 25th of October and my back got in such condition that I had to quit. The section foreman had told me that he thought I should go to the hospital in Waycross, Georgia. On approximately the 25th of October I had to quit work and about five or six days later, I went to the hospital.

Q. In Waycross, Georgia?

A. Yes sir, in Waycross.

Q. Did they take you in up there?

A. Yes sir.

Q. All right, when you went in tell us what happened?

A. They gave me treatments over a period of several months.

Q. What kind of treatments?

A. Traction. They put me in traction and Diathermy treatments.

Q. Did your back get any better?

A. No sir.

Q. Did you improve any at all while you were there?

A. Some days I would feel better.

[fol. 30] Q. Did they allow you to get out of the hospital occasionally?

A. Yes sir.

Q. Did you come home sometimes?

A. Yes sir.

Q. How long would you stay home?
A. A couple of days.
Q. Then go back?
A. Yes sir.
Q. About how many times did you come home during this period of stay?
A. I would say three or four times.
Q. Did your family visit you at the hospital?
A. Yes sir.
Q. You are married Mr. Ward?
A. Yes sir.
Q. And how many children do you have?
A. Two.
Q. Did you own your own home at the time or where did your wife stay while you were in the hospital?
A. She stayed with her mother.
Q. Do you have any parents?
A. No sir.
Q. Are they dead?
[fol. 31] A. Yes sir.
Q. Well, Ray, how long were you in the hospital in Waycross?
A. Approximately six months.
Q. Do you remember what month in 1955 you were discharged from there?
A. In March, 1955.
Q. What did you do then?
A. I applied for a transfer to transportation, the doctors had recommended it.
Q. The doctors there in Waycross had recommended it?
A. Yes sir.
Q. They recommended a transfer to transportation?
A. Yes sir.
Q. For what purpose?
A. They said the work would be lighter, that I couldn't——

Mr. Dell: May it please the Court, this obviously is hearsay. Object to it on the ground that it is hearsay.

The Court: You can't give us the hearsay. You tell us [fol. 32] what you did as a result of the doctors' instruction.

Mr. Faircloth:

Q. As a result of the instruction of the doctors in the Waycross hospital, you did what?
A. I applied for a transfer.
Q. To transportation?
A. To the transportation department.
Q. Any reason for applying there that you know of?
A. Because the doctors said I——

Mr. Faircloth: You can't say what the doctors said.
The Court: Well, you got the transfer, didn't you?

A. Yes sir.

The Court: Now, go on and tell us what you did?

Mr. Faircloth Continuing:

Q. Were you ever transferred into transportation?
A. No sir.
Q. Tell us what happened about that?
A. The transfer was never okayed. The transportation department wouldn't okay the transfer.
[fol. 33] Q. Did you ever work for the railroad anymore?
A. No sir.
Q. What did you do then?
A. I went to work for White Construction Company.
Q. All right, in what capacity did you go to work for White Construction Company?
A. I started out as a common laborer.
Q. At what pay?
A. 75¢ an hour.
Q. And how long did you do that?
A. Just a short while.
Q. About how long would you say?
A. Couple of months, something like that.
Q. Then what did you do?
A. I tried running a tractor, bull-dozer, tried an earth moving pan.
Q. Were you able to do that kind of work?
A. No sir.
Q. Why?
A. Because it was too rough.
Q. It bothered your back?

A. Yes sir.

[fol. 34] Q. What kind of work are you doing now?

A. Running a steel roller.

Q. And what is the nature of that machine, what is it used for?

A. Finishing roads, putting a smooth surface on it.

Q. Does that bother you?

A. No sir.

Q. You are able to do that without any discomfort?

A. I have discomfort at times.

Q. What kind of a surface is it that you run over?

A. Smooth.

Q. It is rock isn't it?

A. It is rock, mixed base but smooth surface.

The Court: You roll in the mix on the highway, is that it?

A. Yes sir.

The Court: You pack down the mix on the highway?

A. Yes sir.

[fol. 35] The Court: Everybody that rides on the highway sees you?

Mr. Faircloth: Thank you, Your Honor.

Q. Is this machine hydraulically controlled?

A. Yes sir.

Q. Is there any reason why you can run this machine better than a bull-dozer?

A. Yes sir.

Q. Why?

A. Because it runs over a smooth surface and too if standing tires me I can sit down.

Q. You can stand up or sit?

A. Yes sir.

Q. Does it bother you to sit for a very long period of time?

A. Yes sir.

Q. Or stand for a very long period of time?

A. Yes sir.

Q. All right, how much do you make now?

A. $1.35 per hour.

Q. Is that the usual wage the White Construction Company pays for a roll concrete operator?

[fol. 36] A. I understand not.

Q. Is there any reason why they pay you $1.35 an hour?

A. They raised me to $1.35 an hour when I was trying to learn the bull-dozer which is considered the scale for an apprentice bull-dozer operator.

Q. And they haven't cut you back?

A. No sir.

Q. How long have you been running that roller now?

A. Right at two years.

Q. Ray does this back bother you at any time other than in your work?

A. Yes sir.

Q. Tell us about that?

A. Well, it bothers me most of the time wherever I am.

Q. Do you wear any kind of support or corset?

A. Yes sir.

Q. Does that relieve you?

A. It helps, yes sir.

Q. Do you sleep on a normal bed?

A. No sir.

[fol. 37] Q. What kind of bed do you have to sleep on?

A. I have a board under the mattress.

Q. Was that prescribed by the doctor?

A. They said it would help, yes sir.

Q. Is there any other difference in your home life when you sleep?

A. At times I can't go to sleep without hot water bottles, heating pad or something of that nature.

Q. How does it effect you in the morning?

A. Well, when I get up in the morning I usually sit first one way and then another. Some mornings my wife has to put my shoes on for me. The same way in the afternoon, some afternoons she has to take them off because I can't bend over that far.

Q. Do you find it bothers you with any activities with your children?

A. Yes sir, I have to be exceptionally careful how I play with them.

Q. Ray, when you were up in the Atlantic Coastline hospital did you talk to any of the railroad officials while you up there about this accident?

A. Yes sir.

Q. Who did you talk to?

[fol. 38] A. Mr. Colson.

Q. Who is Mr. Colson?

A. He is the General Roadmaster for that Division.

Q. How did you happen to talk to him?

A. I believe he called the hospital and asked me to come by his office.

Q. Did you go by his office?

A. Yes sir.

Q. Got out of the hospital and went by?

A. Yes sir.

Q. All right, tell us what happened?

A. He asked me about an injury I was supposed to have sustained while working for the railroad. And he went on to say wasn't I really working for Mr. Fugate. I don't remember his exact words, just the way he put it, but he had dictated this statement and had it typed up and asked me to sign it.

Q. In which he set forth in there that you really were working for a man named Fugate?

A. Yes sir.

Q. At the time of this accident?

A. Yes sir.

Q. Well, did he have his secretary there?

[fol. 39] A. Yes sir.

Q. Have anybody else present?

A. Yes sir.

Q. Who was that?

A. A Mr. Crawford, I believe his name was. He called him in when he started talking to me.

Q. All right, then his secretary typed up this statement?

A. Yes sir.

Q. And brought it back in?

A. Yes sir.

Q. Then what did Mr. Colson do?

A. He wanted me to sign it.

Q. Did you sign it?

A. No sir.

Q. Why?

A. Well, it just wasn't right and I didn't consider that I was working for Perry Fugate.

Q. Why didn't you consider you were working for Perry Fugate?

A. Well, he didn't hire me and he didn't pay me.

Q. Did you think he had anything to do with that thing at the time you were working out there?

[fol. 40] A. No sir.

Q. Until Colson mentioned Fugate to you had you ever heard that Fugate was connected with that road in any way?

A. No. sir.

Q. You had heard it called the McKenzie siding, hadn't you?

A. Yes sir.

Q. Does that always indicate to you that that is owned by somebody else other than the railroad?

A. No sir.

Q. The railroad calls their various sidings by anything?

A. Yes sir.

Q. Well, what did Mr. Colson say when you wouldn't sign the statement?

A. Well, he got kind of mad and said "it doesn't matter if you sign it or not, I have witnesses to it." "He said that is what happened."

Q. All right, you left?

A. Yes sir.

Q. Where did you go from there?

A. Back to the hospital.

[fol. 41] Q. All right, did you at any time later hear from Mr. Colson?

A. Yes sir.

Q. What was the occasion for that?

A. I talked with his office.

Q. And what did you call his office for?

A. To tell him that I would sign the statement if he still wanted me to sign it.

Q. Why did you do that?

A. Because I wanted a transfer and he was mad because I wouldn't sign it originally and I felt like I might not get a transfer out of the railroad if I didn't sign it.

Q. You knew that you had to have a transfer out of the roadway department into transportation, is that correct?

A. Yes sir.

Q. And you knew that Colson was the man that had to sign your transfer out of roadway, is that correct?
A. I wasn't sure that he had to sign it.
Q. You knew he was head of that division?
A. Head of that division, yes sir.
Q. And you knew that he was mad at you?
A. Yes sir.
Q. Because you were not signing that statement?
A. Yes sir.
Q. And you were applying for a transfer to lighter work, [fol. 42] were you not?
A. I had planned to, yes sir.

Mr. Dell: If your Honor please, I am going to ask counsel to put a halter on leading this witness any further.

The Court: I am going to insist on it, Mr. Faircloth. You stop testifying and let your witness testify.

Mr. Faircloth: All right, Your Honor.

Q. On that day did you then sign the statement?
A. Yes sir.
Q. Tell us how you happened to do that and where did you sign it.
A. In the hospital.
Q. Do you remember whether or not Mr. Colson brought it up?
A. No sir, he didn't.
Q. Do you remember who did?
A. I believe it was his secretary.
Q. His secretary brought it up?
A. Yes sir, brought it to the hospital.
Q. Well now, after you signed the statement did you get discharged from the hospital?
[fol. 43] Not right then, no sir.
Q. How soon after that was it that you were discharged from the hospital?
A. Over a period of two or three weeks, I don't remember exactly.
Q. Well, then what did you do?
A. I applied for the transfer out of the roadway.
Q. To whom did you apply?
A. I went to Mr. Keene.
Q. In Chiefland?

A. Yes sir.
Q. Did Mr. Keene give you a transfer?
A. Yes sir.
Q. To transportation?
A. Yes sir.
Q. Had you inquired in transportation as to whether they needed anybody?
A. Yes sir.
Q. Did they?
A. Yes sir.
Q. Who did you inquire of?
[fol. 44] A. Mr. McCallister.
Q. Where is he?
A. Ocala.
Q. Did he say he needed a man?
A. Yes sir.
Q. Did you get the transfer?
A. No sir.
Q. Why?
A. The transportation department would not okay the transfer.
Q. And you never worked another day?
A. No sir.
Q. And that is when you went to work for White Construction Company as you told us here?
A. Yes sir.
Q. Ray, how long had you worked for the railroad before this accident happened?
A. I first worked for the railroad in '52, I believe it was.
Q. What did you do for them first?
A. Operating a ditching machine.
Q. Where?
A. Well, it was a system job. I went on it in Dunellon, Florida.
Q. Well, did you work for them continuously from 1952
[fol. 45] until you got hurt in 1954?
A. No sir.
Q. How long did you work for them the first time?
A. Approximately three months.
Q. Then when did you go back with them?
A. Approximately six months after that, or seven.
Q. All right, where did you work for them the next time?

A. On a bridge gang. At the time I went back I went to Palmetto.

Q. How long did work there with the bridge gang?

A. Until the first of January, first of December, or thereabouts.

Q. Then what happened?

A. I transferred to the section at Chiefland.

Q. At Chiefland?

A. Yes sir.

Q. Any reason for transferring?

A. Yes sir.

Q. What was it?

[fol. 46] A. Where I would be in one place. The bridge gang was moving around.

Q. And you went there classified as an apprentice foreman?

A. Yes sir.

Q. Ray, on the day when you got hurt out there what was your understanding that day as to who you were working for?

A. I understood I was working for the Coastline Railroad.

Q. You thought you were working for the Coastline?

A. Yes sir.

The Court: You were not notified by any employee of the Coastline that you were working for somebody else?

A. No sir.

The Court: Had you done work on other private sidings prior to this time?

A. I think so, yes sir.

The Court: Had you done it on the same basis?

A. Yes sir.

[fol. 47] The Court: I will wait though and let Mr. Dell ask those questions. I was just getting a little impatient.

Mr. Faircloth Continuing:

Q. Ray, what is the weight of a cross-tie like you were lifting over there?

A. I would say approximately a hundred and seventy-five pounds.

Q. Well now, you had done work on sidings before under similar circumstances?

A. Yes sir.

Q. How many times before?

A. Once or twice, I am not sure.

Q. All right now, for whom did you understand you were working for on those occasions?

A. Coastline Railroad.

Q. Did Mr. Keene ever tell you that you were now working for Mr. X or Mr. Y and not for the Atlantic Coastline Railroad?

A. No sir.

Q. He didn't do it on the day of this accident?

A. No sir.

Q. He didn't do it the day before when he told you to report?

[fol. 48] A. No sir.

Q. And he didn't do it on these other occasions when you tell us you were working on sidetracks at Chiefland?

A. No sir.

Q. He promised you overtime?

A. Yes sir.

Q. You got overtime?

A. Yes sir.

Q. When you did it on Saturday?

A. Yes sir.

The Court: Ask him the other question—did you usually work on these private sidings on Saturday?

A. Usually, yes sir.

The Court: You usually did?

A. Yes sir.

The Court: You have no idea yourself as to why it was done on Saturday?

A. No sir.

The Court: Go ahead, Mr. Faircloth.

[fol. 49] Mr. Faircloth Continuing:

Q. Ray, what doctors have you seen besides these Railroad Company doctors?

A. Well, recently I saw Dr. Parnell, first; Doctor Manchester and Dr. Hawks.

Q. Who is Dr. Hawks?

A. He is a doctor here in Gainesville. Since then I have seen Doctor Aten, in Miami; Dr. Von Storch, in Miami.

Q. All right, since you have been in Gainesville, yesterday, did you see any doctor?

A. Yes sir.

Q. Who were they?

A. I saw Dr. Sunnyland.

Q. Did you go to any other doctor's office?

A. Yes sir.

Q. What doctor was that?

A. I went to Dr. Dell's office.

Q. Here in Gainesville?

A. Yes sir, to have some x-rays taken.

Q. At the request of the railroad?

A. Yes sir.

Q. And you also went to Dr. Sunnyland at the request [fol. 50] of the railroad?

A. Yes sir.

Q. Ray, when did you start to work for Mr. Keene before this accident happened?

A. Around the 1st of December, 1953.

Q. Of 1953?

A. Yes sir.

Q. And this happened in May of 1954?

A. Yes sir.

(You may inquire)

Cross-examination.

By Mr. Dell:

Q. May it please the Court. Mr. Ward, when you came in off of your job on the afternoon of Friday, May 21st, 1954, you had made a full week with the railroad at that time, hadn't you?

A. Normal week, yes sir.

Q. Forty hours?

A. Yes sir.

Q. How often did the railroad pay you, twice a month?

A. Yes sir.

Q. That was the 15th and 30th?

A. Yes sir.

[fol. 51] Q. Did you ever get money from the railroad other than by railroad check?

A. Yes sir.

Q. How and from whom?

A. Mr. Keene.

Q. How did he pay you?

A. Cash money.

Q. You know that that money was railroad money?

A. I believe it was, yes sir.

Q. Why did you believe so?

A. Because I believed I was working for the railroad.

Q. You believed you were working for the railroad and, therefore, that is the only reason you have for believing it was railroad money?

A. Yes sir.

Q. Did Mr. Keene ever tell you that Mr. McKenzie, or Mr. Fugate, or Mr. Hires, or Mr. Watson, or Mr. Andrews, or any of those fellows down there that have got those private tracks were paying you?

A. No sir.

Q. You believed you were working on a private track, didn't you?

A. No sir.

Q. You did not?

[fol. 52] A. I didn't know who owned it.

Q. You thought it was a private track?

A. I know they called it the McKenzie siding.

Q. And you thought it was a private track?

A. I am not sure, I didn't know.

Q. You didn't know whether it was or it wasn't?

A. I didn't know who actually owned it.

Q. But for the regular time you put in on the railroad, working on the railroad main line, you always got paid by a railroad check, didn't you?

A. Yes sir.

Q. There never was any deviation from that at all, was there?

A. No sir.

Q. And that check was given to you usually by the station agent there in Chiefland?

A. Yes sir.

Q. Now, do you recall that Friday night when you came

back in to the tool house, you, and there were four colored boys besides you and Mr. Keene, wasn't there?

A. Yes sir.

Q. You all came back in there Friday night and you recall Mr. Keene saying to you all that Mr. McKenzie [fol. 53] wanted his track repaired the next day and if you wanted to make some extra money you could?

A. No sir.

Q. You don't recall it?

A. No sir.

Q. Do you recall him asking you what time you wanted to meet that morning to go to work?

A. No sir.

Q. How did you get to work that morning?

A. We loaded the tools in a pick-up truck and I believe Mr. Keene drove his own car down there.

Q. Was that Richardson's pick-up truck?

A. Yes sir, I believe it was.

Q. Did you ride over to the job in the truck?

A. I believe I was with Mr. Keene in the car.

Q. You think you went to the job with Mr. Keene?

A. Yes sir.

Q. Had you ever heard of Mr. Fugate?

A. I had heard of him, yes sir.

The Court: May I break in? There are a few holes I would like to have filled in.

[fol. 54] Mr. Dell: Yes sir.

The Court: Let me ask you this question—you went in a third party's truck with these tools on that Saturday, is that what you testified?

A. Went in what, sir?

The Court: They loaded these tools into somebody's, third party, truck and not a railroad truck?

A. Yes sir.

The Court: And taken to that job?

A. Yes sir.

The Court: And you rode in a private automobile of your foreman?

A. Yes sir.

The Court: Was that the usual way you went to work on the railroad?

A. No sir.

The Court: How did you all go to work on the railroad?

[fol. 55] A. On the motor car.

The Court: Always, didn't you?

A. Yes sir.

Mr. Dell: Thank you, Your Honor.

Mr. Dell Continuing Cross-examination:

Q. I want to jump over to one time you said you were in Waycross?

A. Yes sir.

Q. And that you were in the hospital?

A. Yes sir.

Q. Did you call for Mr. Colson or somebody in his office to bring the statement up there?

A. Yes sir.

Q. Who brought the statement to you?

A. This lady in his office, I suppose it was his secretary.

Q. Was Mr. Colson with her?

A. No sir.

Q. He wasn't there?

A. No sir.

Q. Did you sign the statement at that time?

A. Yes sir.

[fol. 56] Q. And the statement was written at that time?

A. You are speaking of in the hospital?

Q. Yes?

A. There was no one there but me and her when I signed it.

Q. No one there but you and her?

A. Yes sir.

Q. And that was in the hospital?

A. Yes sir.

Q. And you are absolutely positive about that?

A. Yes sir.

Q. And you said that the transportation department wouldn't okay your transfer, why wouldn't they, do you know?

A. No sir.

Q. How much does that roller weigh that you are operating?

A. It is classified as a ten to twelve ton roller.

Q. Did you drive a truck while you were working for White Construction Company?

A. I tried anything.

Q. Did you drive a D-8 Caterpillar?

A. I tried it, yes sir.

[fol. 57] Q. That is one of the biggest caterpillars that there is, isn't it?

A. Just one larger.

Q. Just one larger?

A. Yes sir.

Q. And now you are driving a ten ton roller?

A. Yes sir.

Q. And you have been doing that for two years?

A. Approximately, yes sir.

Q. Now when you worked for the railroad down there at Chiefland from December until May of 1954, you worked a five day week, from Monday to Friday, didn't you?

A. Normally, yes sir.

Q. That was a normal work day week?

A. Yes sir.

Q. And on Saturday, that was your day off?

A. Normally, yes sir.

Q. And Saturday and Sunday you were free to do whatever you wanted to do?

A. Normally, yes sir.

Q. And you had to go back to work Monday morning at 7:00 o'clock?

A. Yes sir.

[fol. 58] Q. Now, on this particular Saturday you went with Mr. Keene and the others up to the M & M track, didn't you?

A. Yes sir.

Q. What kind of work did you do there?

A. Replaced cross-ties.

Q. That was the same kind of work you had done before?

A. Yes sir.

Q. As a matter of fact, when you came with the job Mr. Keene showed you how to do that work, didn't he?

A. I don't remember him, himself, showing me but one of the crew did.

Q. Didn't Mr. Keene work right along side by side with you when you first started?

A. No sir.

Q. He didn't show you how to use the tie hooks?

A. No sir.

Q. He didn't explain to you about how to put a tie under the track?

A. No sir, I worked with a laborer.

Q. Was there anything different about the way you were working on the track there that morning at the M & M [fol. 59] track and the way you worked at your regular time when you were working for the railroad?

A. No sir.

Q. Did your foot slip?

A. No sir.

Q. Did you step on anything that made your ankle turn?

A. No sir.

Q. Were you putting in those ties with those tie hooks like they had showed you to put them in?

A. Yes sir, same method.

Q. Were you operating in the same way any of the other fellows that put in ties operated to put ties under the track?

A. Yes sir.

Q. Leaned over and grabbed the tie and placed the tie with your back to the railroad and pulled the tie between your legs, didn't you?

A. Yes sir.

Q. Now you are supposed to put that tie hook on that tie, they have short points on the end of the hooks on either side, and you pull that tie hook toward you, increasing the pressure all the time, don't you?

A. Yes sir.

[fol. 60] Q. Well why, when you were answering Mr. Faircloth's questions awhile ago, did you say that you snatched that tie?

A. Well, you don't put a steady pull on it. I don't know how to describe it. You just pull the tie. You can put a sudden snatch on it or you can pull it gradually. The usual practice was to snatch the tie.

Q. The usual practice was to snatch it?

A. Yes sir.

Q. And that was the way you were taught to do it, to snatch it?

A. Yes sir.

Q. Nobody told you not to snatch it but to just pull it to you gradually?

A. How was that?

Q. Nobody told you not to snatch it but to just pull it to you gradually?

A. They didn't specify how to pull it, they just showed you how to hook it and throw under the tie.

Q. Was there anything wrong with the tools you were working with?

A. No sir.

Q. They were the same tools that you worked with all the time that you have been working for the railroad?

[fol. 61] A. While on that section, yes sir.

Q. Were there any deep ditches there by the place where you were working or was it just a level track laying right on top of a sandy dirt type ground?

A. The track was partially covered up.

Q. There weren't any deep ditches or any grade there at that place?

A. No sir.

Q. Hadn't you, when you ordinarily worked on that crew, worked as an individual?

A. Yes sir.

Q. And everybody else on the crew did the same thing, worked by themselves?

A. Yes sir.

Q. Did you ask anybody that morning for assistance to work with you, two people on your job?

A. No sir.

Q. Was there anything different that day at all with the way you were replacing those ties than the way you replaced ties whenever you were working on the section crew?

A. No sir.

Q. Not a thing?

A. No sir.

Q. Do you remember who was working by you?

[fol. 62] A. I believe Jesse McBride was.

Q. Which side of you was he on, the side toward the main line track or toward the M & M office?

A. The main line.

Q. Who was on the side toward the M & M office?
A. I don't remember anyone being on the other side.
Q. All members of the crew were out there you said?
A. Yes sir.

The Court: But you all were strung out up the track, were you?

A. Yes sir, we were all strung up the track.

Mr. Dell Continuing:

Q. All right, you say that your back popped and you tried to snatch it again?
A. Yes sir.
Q. You couldn't do it?
A. No sir.
Q. And you were bent over at that time?
A. Yes sir.
Q. Did you ask anybody around to help you?
[fol. 63] A. No sir.
Q. You say you went up and told Mr. Keene that you wanted to leave the job?
A. I told him I felt I should go home, yes sir.
Q. Did you tell him why?
A. Yes sir.
Q. What did you tell him?
A. I told him that I had hurt my back.
Q. Did you ask him to take you home?
A. No sir.
Q. You just turned around and walked off the job?
A. Yes sir.
Q. How far did you have to walk to Mr. Keene from where you were? Where you were working when your back popped?
A. I don't know the exact distance. I would say thirty to fifty feet from where I was, somewhere in that vicinity.
Q. About the length of a box car?
A. Probably, yes sir.
Q. Which was was Mr. Keene from where you were when you snapped your back?
[fol. 64] A. He was between me and the main line.
Q. You had to walk up toward the main line?
A. Yes sir.

Q. Then you had to walk by everybody else that was working in the crew to get to Mr. Keene, didn't you?

A. Not necessarily, no.

Q. You told me a minute ago that there wasn't anybody working on the office side of you that McBride was between you and the main line track and that you had to walk fifty or sixty feet up toward the main line track to see Mr. Keene. Other members had to be in that area, didn't they?

A. They could have been on the other side, I just don't remember.

Q. You mean they could have been on the other side of Mr. Keene, on up on the other side of the main line track?

A. No sir.

Q. Back toward the M & M office?

A. No sir.

Q. Where could they have been?

A. They could have been strung out fifty or sixty feet there and Mr. Keene could have been between me and the last man down there. I don't remember the exact position [fol. 65] of them.

Q. You don't remember walking by any men as you went up to Mr. Keene?

A. I wasn't conscious of it, no sir.

Q. Did you see Mr. Keene later up town that same morning?

A. No sir.

Q. What time did you all get out to the job?

A. Shortly after 7:00 o'clock.

Q. Do you know how much work you all did out there that day?

A. No sir.

Q. Do you know how much work was to be done?

A. Not exactly, no sir.

Q. Do you remember that you didn't have to put in but seventeen or nineteen ties?

A. I don't remember the number.

Q. You were working right there by the little place where the road crosses the railroad track on the siding?

A. Yes sir.

Q. You were working there where the trucks go across that siding?

A. Yes sir.

Q. Have you been working on these private tracks be-
[fol. 66] fore.

A. Yes sir.

Q. Every time that you worked on private tracks you got paid in cash, didn't you?

A. Yes sir.

Q. You say after you went home you talked to Doctor Parnell, who came as a result of your wife calling him to come and see you and he didn't do you any good and you came to Gainesville and you saw a doctor here. What did you say his name was?

A. Doctor Manchester.

Q. Dr. Manchester?

A. Yes sir.

Q. Ray, did Dr. Manchester discharge you or did you just quit going to him?

A. I decided to change doctors.

Q. You decided to change and then you went up to Dr. Hawks?

A. Yes sir.

Q. Did you get discharged by him or did you just quit going to him?

A. I just quit going.

Q. Your back felt like you could go back to work, so you went back to see them?

[fol. 67] A. Not exactly, no. I though I had to go to work.

Q. Now, did Mr. Sanders come to see you from the time of the morning of Saturday, May 22nd, until that first day you went back and tried to work with Mr. Keene's crew?

A. I talked to Mr. Sanders one time during that period, I don't remember exactly when it was.

Q. He did come by your house one time while you were off the job?

A. Yes sir.

Q. Did you tell Mr. Sanders then that you had hurt your back playing baseball?

A. No sir.

Q. Are you sure you didn't?

A. Yes sir.

Q. Did you tell Mr. Keene later that you had hurt your back playing baseball?

A. No sir.

Q. Do you recall that after you went with the Gulf Hammock Section in July, of 1954, that you were working one time with Mr. Green's crew down there while the regular foreman was on vacation?

A. Yes sir.

Q. Do you remember that Mr. Keene brought his [fol. 68] crew down there and you were working on some ballasts about the middle or latter part of July?

A. Yes.

Q. Do you remember having a conversation with Mr. Keene at that time and Mr. Green?

A. I don't remember it, no sir.

Q. You don't remember coming up on the track where they were standing and you had been in the woods for awhile and they asked you what was the matter with you and you said your back was hurting?

A. No sir, I don't remember it.

Q. You don't remember at that time and place telling them you had hurt your back playing baseball and that you wished you had hurt it on the railroad?

A. No sir.

Q. You deny that you made such a statement?

A. I don't remember it.

Q. You don't remember it?

A. No sir.

Q. When was it that you decided you had hurt your back on the railroad?

A. When I hurt it that Saturday morning.

Q. That was the time you thought about it?

[fol. 69] A. I thought then I was working for the railroad.

Q. Why didn't you tell the people in Waycross when they took your statement that you thought you hurt your back when you were working for the railroad?

A. Because everyone else told me I wasn't and Mr. Keene told me I wasn't.

Q. Didn't you sign a statement up there that you were not working for the railroad at the time and knew you were working on a private railroad?

A. Yes sir.

Q. Did you sign that statement freely and voluntarily?

A. Yes sir.

Q. Ray, why did you do that if you knew that it wasn't true?

A. Because of the fact I wanted to get out of the hospital and go back to work. It had been a long period of time I hadn't been working and my family wasn't working.

Q. Ray, how many times did you go down to Mr. Colson's office to sign a statement?

A. I never did go to his office to sign it.

Q. Did you go down to Mr. Colson's office to give a statement?

A. I went to his office at his request.

[fol. 70] Q. In Waycross while you were in the hospital?

A. Yes sir.

Q. And you only went there that one time?

A. I don't remember another time. There could have been but I don't remember it.

Q. But you are sure that you signed a statement in the hospital and not in the office?

A. Yes sir.

Q. And you refused to sign it in his office?

A. Yes sir.

Q. What did Mr. Colson say to you when he got mad at you?

A. "Well, it don't make no difference whether you sign it or not. We have witnesses to it."

Q. Did you tell him that you objected to anything in the statement?

A. I told him that it didn't look right.

Q. Did you tell him what didn't look right about it?

A. I think so, yes sir.

Q. Did he offer to change it for you?

A. No sir.

Q. Just left it just like it was?

A. Yes sir.

[fol. 71] Q. And it hadn't been changed when you signed it there at the hospital?

A. No sir.

Q. Did they give you a copy of it?

A. Yes sir.

Mr. Dell: Mark this please, Mr. Clerk, as Defendant's Exhibit No. 1 for Identification.

Q. Now Ray, I am handing you a paper marked Defendant's Exhibit 1 for Identification and ask you if your signature appears on that paper?

A. Yes sir.

Q. Is that the paper that you signed on the 3rd of March, 1955, in Waycross, Georgia?

A. I don't remember the exact date that I signed it.

The Court: Is that the paper that you signed?

A. Yes sir.

Mr. Dell Continuing:

Q. That is the statement that you signed in Waycross?

A. Yes sir.

Q. And the witnesses names here do you recognize those?

[fol. 72]

A. Mr. Crawford was the man that Mr. Colson called in the room.

Q. And Mr. Colson also signed it there?

A. Yes sir.

Q. Now, they were in your hospital room when you signed this paper?

A. No, the secretary was in there.

Q. Colson wasn't there?

A. No sir.

Q. What about Mr. Crawford?

A. He wasn't there.

Q. He wasn't there?

A. No sir.

Q. Well now, Ray, I don't want to confuse you but couldn't you be mistaken about Mrs. Crawford being a lady rather than a Mr. Crawford being a man?

A. I wasn't sure of the lady's name, never was. The secretary in the office brought the statement to the hospital.

The Court: It was a lady that brought it to the hospital?

A. Yes sir.

[fol. 73] The Court: Whatever her name was.

Mr. Dell Continuing:

Q. And that was Mr. Colson's secretary?

A. Yes sir.

Q. At the bottom of this statement it says "A true statement of facts". Do you agree that the facts in here are true?

A. No sir.

Q. But you did not call out to Mr. Colson's attention at the time this statement was given which one of the facts were not true?

A. Yes sir.

Q. You did?

A. Yes sir.

Q. You told him specifically which ones?

A. Yes sir.

Q. And he wouldn't do anything about it?

A. No sir.

Q. Ray, before this morning on Saturday, May 22nd, 1954 had you ever had any trouble with your back?

A. No sir.

Q. Had you ever complained about your back hurting you before?

[fol. 74] A. No sir.

Q. Did you ever as a matter of fact get an injury to your back while you were playing baseball?

A. No sir.

(Your witness)

The Court: Any questions?

Mr. Faircloth: Yes, Your Honor.

Redirect examination.

By Mr. Faircloth:

Q. Ray this letter, or this statement, that you told us you signed, is that the one you referred to awhile ago when you were talking about Mr. Colson trying to get you to sign down at his office?

A. Yes sir.

Q. And you refused?

A. Yes sir.

Q. And then later called him up and told him that you would sign it?

A. Yes sir.

Q. And for the reason you told the jury?

A. Yes sir.

Mr. Faircloth: Your Honor, the plaintiff would like to [fol. 75] tender this into evidence.

The Court: All right, let it be received in evidence. You have the right to do it since it has been filed for Identification.

RECEIVED IN EVIDENCE AND MARKED PLAINTIFF'S EXHIBIT No. 2.

Mr. Faircloth Continuing:

Q. Ray I want to read you the first paragraph of this letter: "Waycross, Georgia. March 2, 1955. Statement of Raymond E. Ward, Apprentice Foreman, Chiefland. May 22nd, 1954. All concerned. On Saturday morning when not on duty with the Atlantic Coastline Railroad Company, about 9:15 A.M., May 22nd, 1954, I was engaged in assisting Section Foreman I. H. Keene in reconditioning a private industry track in Chiefland, Florida, belonging to D. P. McKenzie Company, which company had advised a local farmer Mr. Perry Fugate, who wished to use this track, that if he would recondition this tract he could use it. It was for this reason that Mr. Keene, I, and several colored laborers were hired by Mr. Fugate, on our time, on Saturday, May 22nd, 1954, to recondition this track for him and at about 9:15 A.M., on this date I was engaged in inserting a cross-tie with the tie hooks when I felt something [fol. 76] pop in the lower part of my back which was very painful." My question to you is that your statement or is that Mr. Colson's statement?

A. Mr. Colson's statement.

Q. Did he dictate it?

A. Yes sir.

Q. Is that the part that you didn't agree with at the time you refused to sign it?

A. Yes sir.

Q. Why?

A. Because it wasn't true.

Q. What about it wasn't true?

A. Because Mr. Fugate didn't hire me.

Q. Did you have anything to do with Mr. D. P. McKenzie, either?

A. No sir.

Q. It says here, "I was assisting Section Foreman, I. H. Keene, in reconditioning a private industry track, belonging to D. P. McKenzie Company, which company had advised a local farmer"—did you know anything about advice to a farmer named Perry Fugate?

A. No sir.

Q. Had you ever heard anything about that?

A. No sir.

[fol. 77] Q. Had you ever heard anything about that?

A. No sir.

Q. Until the time Colson brought it up to you in his office?

A. No sir.

Q. Perry Fugate who wished to use this track if he would recondition this track he could use it, did you know anything about that?

A. No sir.

The Court: You read it to them if you want them to know what is in it. Let's not take the time to let each one read it separately.

Mr. Faircloth Continuing:

"I immediately, on my own, went to Dr. Parnell in Chiefland to treat me but did not help me so much. So I went to Dr. Manchester in Gainesville, Florida, who treated me for several weeks, and then I changed to Dr. Hawk in Gainesville, Florida, who treated me and I got all right and on about July 15th, 1954 I reported back to work as Apprentice Foreman and worked for Foreman Pittman on the Gulf Hammock section until October 25, 1954. Then my back kept [fol. 78] bothering me to the extent that I decided to go to the ACL hospital, Waycross, Georgia, as I was a paid-up member of the Relief Department. I reported to the ACL hospital in Waycross, Georgia, and told them I was suffering from a back injury sustained while handling a cross-tie which was the injury referred to above. I entered the hospital as a patient on November 8th, 1954, where I have undergone treatment for my back since. I do not know exactly how much longer I will be confined to the hospital. The doctor advised me that I may never be able to do any

work again. I do not know what this is all about as I have not at any time tried to construe to anyone that I sustained a personal injury while on duty with the Atlantic Coastline Railroad because I have not. I have been furnished a copy of this statement which is a true statement of facts.

Witnessed by: W. H. Colson and M. V. Crawford.

Q. Now, Ray, are you clear that when this thing was signed, you signed it in the hospital?

A. Yes sir.

Q. And this lady brought it to you?

A. Yes sir.

[fol. 79] Q. And was Mr. Colson there?

A. No sir.

Q. Was Mr. Crawford there?

A. No sir.

Q. Were these signatures on there at the time you signed it?

A. I don't remember, sir.

Q. Was that statement sworn to?

A. No sir.

Q. Nobody told you to hold up your hand?

A. No sir.

Q. And swear to tell the truth, so forth?

A. No sir.

Q. Just signed the paper?

A. Yes sir.

Q. Ray, this morning when you got the tools in whose truck did you load them in to?

A. Frank Richardson's.

Q. Now, who is he?

A. One of the laborers on the section.

Q. All right, and you rode with Mr. Keene you think?

A. Yes sir.

[fol. 80] Q. Now, when you went in the motor car you were going up and down the main line track, is that correct?

A. Yes sir.

Q. How far was this side-track from the tool house?

A. Approximately a mile and a half.

Q. From where you customarily got your tools?

A. Yes sir.

Q. Did that side-track run into the main line track of the Coastline?

A. Yes sir.

Q. What is this about a baseball injury, were you ever hurt playing baseball?

A. No sir.

Q. Did you ever tell anybody as is mentioned here that you got hurt playing baseball?

A. No sir.

The Court: Were you a star baseball player?

A. No sir.

The Court: Were you pretty good?

A. Just fair, sir.

[fol. 81] The Court: Just fair, all right.

Mr. Faircloth: Thank you Your Honor, that is all.

The Court: Any questions, Mr. Dell?

Mr. Dell: Yes, Your Honor, just one further one.

Recross-examination.

By Mr. Dell:

Q. Ray, you were a paid up member of the Relief Department of the Coastline Railroad when you went into the hospital?

A. Yes sir.

Q. You could have gone into the hospital whether you had been sick or whether you had been injured off the Coastline property, could you not?

A. Yes sir.

The Court: Anything further.

Mr. Faircloth: Nothing further, Your Honor.

The Court: We are going to recess until 9:30 tomorrow morning. I would like to see counsel in my Chambers for just a minute.

[fol. 82-110] (On December 4th, 1957 at 9:30 A. M., Court reconvened and the following proceedings were had:)

The Court: Good morning everyone. Be seated please. Call your next witness.

* * * * * * *

[fol. 111] Mr. Faircloth: Your Honor, the plaintiff desires to call Mr. I. H. Keene, as agent of the defendant, managing agent.

The Court: As a hostile witness?

Mr. Faircloth: As a hostile and adverse witness.

Mr. Dell: Hostile for what reason?

Mr. Faircloth: Well, he is not on my side and I don't anticipate that he will be very friendly to me.

The Court: Well, you have the right to call him as a hostile witness.

I. H. KEENE was next witness called and having been previously sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Faircloth:

Q. State your full name, please?

A. I. H. Keene.

Q. Where do you live Mr. Keene?

A. Chiefland, Florida.

[fol. 112] Q. What do you do?

A. Section foreman for the Atlantic Coastline Railroad.

Q. How long have you been in that position?

A. That division?

Q. Yes sir?

A. About twenty years as Section Foreman. Fifteen of them will be in Chiefland middle of February this year. This next coming year.

Q. All right, as a Section Foreman you are in charge of a crew, are you not?

A. Yes sir.

Q. And how many do you have in that crew?

A. Well, at the present we have three laborers and an apprentice.

Q. In 1954 what was the size of your crew?

A. I believe it was four and an apprentice at that time.

Q. You had four laborers and an apprentice foreman?

A. I think so.

Q. In 1954?

A. Yes sir.

Q. Was Ray Ward the apprentice foreman you [fol. 113] speak of?

A. Up until about the middle of the year of 1954, yes sir.

Q. All right now, could you name your other crew members during that period of time?

A. Well, Hio Thompson, Frank Richardson, Jesse McBride, J. P. Brown.

Q. Hio Thompson, Frank Richardson, J. P. Brown and Jesse McBride?

A. Yes sir.

Q. Do you still have all those fellows with you?

A. I said I have three.

Q. Which one of them isn't there?

A. McBride.

Q. Jesse McBride?

A. Yes sir.

Q. When did he leave the Coastline?

A. He left about a couple of years ago.

Q. Do you know where he is now?

A. I think he lives down at Lakeland, Florida.

[fol. 114] Q. Have you seen him lately?

A. I saw him three or four days ago.

Q. Here in Gainesville?

A. Yes sir.

Q. What was your occasion for seeing Jesse?

A. What was my occasion for seeing Jesse?

Q. Yes?

A. He was up on the street.

Q. Just met him on the street?

A. Well, he came up in the office down there where we was at.

Q. And what office was that?

A. Mr. Dell's office.

The Court: You were called to Mr. Dell's office as a witness in this case?

A. Yes sir.

The Court: And he was called as a witness?

A. Yes sir.

The Court: You want the jury to know about it, so they know about it now.

[fol. 115] Mr. Faircloth Continuing:

Q. Mr. Keene will you tell the jury what your duties were at Chiefland as the Section Foreman, what you did with that crew of men?

A. Maintaining track. Anything that came in line with keeping up the track, placing cross-ties, laying rails, smoothing the track.

Q. To go up and down the main line was your section?

A. Yes sir.

Q. Did you also take care of your side tracks?

A. The side tracks belonging to us, yes sir.

Q. What about the side-tracks belonging to somebody else?

A. They taken care of those individually.

Q. You mean they had their crews take care of them?

A. Well, some of them did and sometimes if they didn't have anybody and it was on our off days, on Saturday and Sunday we are off. We don't work for the railroad company on Saturday or Sunday unless they have an emergency and call us.

Q. Did you ever work for the railroad on Saturday?

[fol. 116] A. Yes sir, in case of emergency?

Q. Any other time but an emergency?

A. No sir.

Q. All right, you say that some of these fellows that have side-tracks maintain them themselves?

A. Yes sir, use their labor and hire homebody to do it.

Q. Now, is that including the times when the Coastline trains go to park cars?

A. Anytime it needs repaired, yes sir.

Q. Do they just fix it like they want to fix it, the side-tracks?

A. Like they want to fix it?

Q. Yes?

A. Yes sir, they fix it up like it ought to be, but we have to inspect it before they can use it.

Q. You inspect this before the train goes over it?

A. Yes sir. Any time a private track is repaired, it is my duty as section foreman if it is in my territory to inspect that track.

Q. And to see that it is safe for the trains to go over?

A. Yes sir.

[fol. 117] Q. At all times they have to meet Coastline specifications, don't they?

A. Before they put the trains on them.

Q. If a Coastline train is going on there it has to meet those fine specifications?

A. Yes sir.

Q. What are the general specifications?

A. It has got to be safe for the cars to roll on.

Q. Well, let's say about the spacing of ties. How far apart are the ties?

A. Well, on our main line we space them on nineteen and a half inch fenders.

Q. Now, what about your side-tracks?

A. Our side-tracks we use a twenty-two inch fender.

Q. Now, what about these side-tracks owned by these individuals?

A. Well, they differ. Some of them put them further apart than athers. Not any of them over twenty-four inches that I ever saw.

Q. Would you okay a train to go on a side-track like that with too wide a space?

[fol. 118] A. No sir, not if it was too wide. If it wasn't over twenty-four inches I would okay it.

Q. It has to come up to what you feel is safe?

A. Yes sir.

Q. Now, on the day that Ray Ward got hurt here in Chiefland, do you remember that day?

A. I remember the day he said that he got hurt.

Q. You didn't know anything about his getting hurt?

A. No sir.

Q. You were out there, weren't you?

A. Yes sir.

Q. You knew nothing about him getting his back hurt?

A. No sir.

Q. On the job?

A. No sir.

Q. What time did you get out there that morning?

A. Best I remember, Mr. Faircloth, we went out there about 7:00 o'clock.

Q. What time did you usually go to work during the week?

[fol. 119] A. We usually go to work at 7:00 o'clock.

Q. All right now, who all were out there that day working?

A. Well, Ray Ward, myself, A. P. Brown, Frank Richardson and Hio Thompson.

Q. And Jesse McBride?

A. Jesse McBride I don't think—I am not sure he was there that day, but he has worked at times with us on private jobs. We didn't use them all every time. It was voluntary work if they wanted to make the extra money, or something like that, when we took a job like that they could work or not work.

Q. You carefully explained all of that to them before you went out there, didn't you?

A. Yes sir.

Q. Mr. Keene, you know that Ray was out there that day?

A. Yes sir, I know that he was out there that morning.

Q. Did he finish the morning?

A. Well, he was there whenever I left to go get the pay for our work. We had about two hours work out there that morning. There were around nineteen ties that Mr. McKenzie wanted to hire us to place for him.

[fol. 120] Q. So he was there when you left to go get the check?

A. Yes sir, that's right.

Q. When you came back was he there?

A. I didn't come. I told them when they finished to load their tools and come on down there and I had to get the check cashed at the bank and we would divide it and each man would get his pay.

Q. He was there when you left and you didn't come back?

A. No sir, I met them at the tool house.

Q. Whose tools were you using?

A. Coastline Railroad tools.

Q. The tools that you used every day of the week?

A. Yes sir, every day in the week.

Q. How much were you getting paid that morning for that work out there?

A. I am not right sure just what the rate was then, but at that time I believe it was $1.612.

Q. You were getting overtime?

A. They usually paid us time and half time for working on their tracks from what we got from the railroad.

[fol. 121] Q. Time and a half based on your railroad pay?

A. Yes sir.

Q. Any reason for that?

A. They were glad to get us to fix the tracks so they could use them.

Q. I see. Well now, Mr. Keene, did you later see Ray during that day?

A. I saw him up there between the bank and the depot when I gave him his money.

Q. You saw him up town in Chiefland?

A. Yes sir, in Chiefland, between the bank and the depot.

Q. On Saturday afternoon, May 22nd, 1954?

A. It was that morning just after I left and went and got the check and went on to the bank.

Q. He was up there then?

A. Yes sir.

Q. All right, did he say anything to you then about his back injury?

A. No sir.

Q. It is your testimony that you did not go to his house to give him his money?

A. No sir.

Q. You are positive you did not?

[fol. 122] A. Yes sir.

Q. All right, you are also positive that the boy didn't go to you that morning and tell you that he had hurt his back?

A. Yes sir, I am positive.

Q. You are positive that he didn't do that?

A. No sir, he didn't tell me at any time that he hurt his back working on the tracks.

Q. Mr. Keene I want to put it to you like this——

A. Yes sir.

Q. I am going to ask you if this happened or didn't happen—isn't it a fact that this boy walked up to out there on that track that morning and said "Mr. Keene I have hurt my back and I think I ought to go in"?

A. No sir.

Q. That didn't happen?

A. Not that I remember, no sir.

Q. Now, would you remember if it had happened?

A. Yes sir, I believe that I would.

Q. And you don't have any recollection of anything like that happening?

A. No sir.

Q. You say it did not happen?

[fol. 123] A. I say that he didn't tell me that if it happened.

Q. You say you were not even there when he got his back injured?

A. That's right, if he did it he did it after I left and went to get the money.

Q. All right now, let me ask you this—is it not a fact that when he said that to you that you said "do whatever you think you ought to do"?

A. No sir

Q. You didn't say that?

A. No sir.

Q. All right, you say that you saw him that afternoon and paid him on the streets of Chiefland?

A. No sir, I said that Saturday morning just after I walked out of the bank.

Q. All right, was he standing straight?

A. Just like any other day when we were out there at work.

Q. Nothing wrong with him?

A. Nothing that I could detect with my eyes.

Q. All right, did he report for work on Monday morning?

A. No sir.

Q. He did not?

[fol. 124] A. No sir, he didn't.

Q. Did you check into it to see why he didn't?

A. Yes sir.

Q. What did he tell you?

A. He told me that he was not feeling well and his wife wasn't feeling well, that they were expecting a baby and he didn't have anyone to stay around the house with her and that he was going to stay around there until he got to feeling better and she got better.

Q. How long did that last?

A. Well, the next day he worked for me was about three weeks later.

Q. In June?

A. Yes sir.

Q. What was the occasion for him coming back to work?

A. I guess he got to feeling like he better get back to work, or something, got to feeling better .

Q. Did you inquire whether his wife was still sick or he was still sick?

A. No sir, I taken him at his word.

Q. On that Monday when you found out about it?

A. Yes sir.

[fol. 125] Q. Now, did you go to his house on that Monday to find out about it or did he come and tell you that he wasn't feeling well?

A. On Monday?

Q. Yes.

A. No sir, I didn't say he told me on Monday.

Q. When did he tell you?

A. Sometime that Saturday afternoon.

Q. Oh, Saturday afternoon?

A. He said he would not report for work Monday.

Q. And he came back three or four weeks later?

A. Yes sir.

Q. Well, how long did he work that time?

A. He worked that one day for me, that time.

Q. Did he make a full day?

A. No sir, he left my job I would say about 2:00 o'clock best I remember.

Q. Why did he leave the job?

A. He said his back was hurting.

Q. Now, what did you have him doing?

A. I believe we were smoothing the tracks that morning.

Q. You were smoothing the tracks?

A. Yes sir, smoothing tracks.

[fol. 126] Q. You were not moving drums at that time?

A. No sir, not that time. We used jacks and aircraft machines.

Q. An he worked until about 2:00 o'clock and left?

A. Yes sir, he said he wasn't feeling good, his back was worrying him and he left.

Q. Now, when was the next time that you saw Ray?

A. Well, I saw him, he lives right there in Chiefland. He lives on this side of town and I live on the other side and I would see him every two or three days occasionally around town.

Q. Well, did he ever work for you again after that day he left at 2:00 o'clock?

A. Not directly under my supervision, no sir.

Q. What do you mean by that?

A. Well, I mean, we double up crews sometime and I moved my crew to the next crew where he was in, and had the pleasure of working with him on two or three occasions.

Q. It was a pleasure working with him?

A. I had the pleasure of working the crews together that he was in.

Q. Why was that a pleasure to you?

A. Maybe I didn't make that clear to you.

[fol. 127] The Court: Don't object to him using a nice word.

A. It was a necessity of the company to double the gangs up and then sent me to work with the crew he was in and we would all be together then.

Q. He was down at Gulf Hammock, wasn't he?

A. Yes sir, he was working on the Gulf Hammock crew.

Q. He was transferred away?

A. He was moved, yes sir, from my gang to Gulf Hammock.

Q. Who moved him?

A. The Road Master.

Q. Who was that?

A. Mr. F. B. Sanders.

Q. Mr. F. B. Sanders?

A. Yes sir.

Q. Where was he located?

A. Perry, Florida.

Q. He was your boss?

A. Yes sir.

Q. And he moved Ray to Gulf Hammock?

A. Yes sir.

[fol. 128] Q. Well, do you know how long he worked at Gulf Hammock?

A. No sir, some three or four months, I wouldn't say just how long.

Q. All right, do you know what happened to him after that, after he left you and went to Gulf Hammock?

A. I think he went to the Coastline Hospital.

Q. In Waycross?

A. Yes sir, I believe so.

Q. Now, do you know that?

A. Well, he was in the hospital. I just take it for granted that there is where he went.

Q. Is that a fact, Mr. Keene?

A. I don't know whether there was any time that elapsed after he went to work at Gulf Hammock and the time he went or not, I am sure.

Q. Isn't it a fact Mr. Keene, that the next time you heard about him the Coastline people were calling you from Waycross to find out about an accident that happened on your section crew that you hadn't reported?

A. About Ray?

Q. Yes, before he went to the hospital?

A. No sir.

[fol. 129] Q. Were you ever asked why you didn't report that accident?

A. Yes sir, sometime the first of the year after he had been up there some two, three or four months.

Q. Who asked you?

A. Mr. Sanders wrote me and wanted my report on Mr. Ward's injury.

Q. And you told him that you didn't know anything about it?

A. He never did tell me that he got injured on the job.

Q. That is what you told him and that is when they started inquiring?

A. Yes sir.

Q. Mr. Keene, how did the men on your section put in a cross-tie under the rails?

A. They would just take the shovels and move the dirt or the route, whichever the occasion might be, away from the old tie and take a crow-bar or saw-bar, known to us, to remove the tie and take a pair of tie hooks and straddle the tie and slide it in.

Q. Straddle the tie?

A. Yes sir.

Q. Hook the tiehooks in it?

[fol. 130] A. Yes sir.

Q. And slide it into place?

A. Yes sir.

Q. In the hole under the rail?

A. Yes sir, slide it right under the rail.

Q. About how many throws did it take to get it under there?

A. Well, if a man is experienced in it, sometimes he can throw it in there in once, sometimes two, and sometimes it might take three.

Q. It would depend on how hard he threw it for one thing, wouldn't it?

A. Yes sir.

Q. And how much experience he had at it?

A. Yes sir.

Q. Now, is that the way you told Ray to do this?

A. That is the way, whenever he went to work for me, that is the way I showed him to do it.

Q. You showed him how to do it, did you?

A. Yes sir.

Q. That is the way you had been shown how to do it?

A. That is the way I had been shown to do it.

Q. And you had been doing it that way a long time, hadn't you?

[fol. 131] A. Yes sir.

Q. Now, did you ever tell them anything about a safety measure to be adopted to protect their backs?

A. Yes sir. Tell them to be careful and not get hurt and not get too close together so they wouldn't be liable to hit one another when the other one threw.

Q. Now, did you ever show your men literature, posters, and pictures, showing them how to lift so as to diminish the possibility of a back injury?

A. Yes sir, we get safety posters and post them up in the tool house and explain it to them.

Q. You explained them to your men?

A. Yes sir.

Q. How often did you have these sessions?

A. Sir?

Q. How often did you have these sessions that you explained to your men about lifting?

A. About lifting?

Q. Yes?

A. We all times were talking about safety every day in your line of work.

Q. These instructions that you get from your higher ups and these posters, did any of them ever indicate to you that this was a dangerous way to do this, these ties? [fol. 132] A. Some of them show you the proper way and some show the improper way.

Q. Well, did you have any that showed the way that you were doing it, was the proper way?

A. I wouldn't say that I had any showing the exact way of pulling in a tie. I had some showing the position in which to lift.

Q. Mr. Keene do you see anything dangerous about throwing a tie under there the way Ray Ward was doing it the day that he got hurt?

A. I didn't see him when he got hurt. I didn't see anything dangerous——

The Court: Well, assuming that he was doing it in the proper manner he had been instructed?

A. Yes sir, the same manner that I had been raised up with railroad men, I worked for them in putting in crossties for around thirty years or a little over.

Mr. Faircloth Continuing:

Q. And you didn't see anything wrong with the way he was putting them in?

A. Nothing unusual in the general routine of placing ties.

Q. And nobody had ever told you there was anything [fol. 133] wrong about the way you were doing it?

A. No sir.

Q. None of this literature that you got indicated to you that the way you were doing that might be dangerous to a man's back?

A. No sir.

Q. Mr. Keene, this siding you all were working on that morning, was that a Coastline siding?

A. No sir. It was the M & M Turpentine Company, owned by Mr. D. P. McKenzie.

Q. Was Mr. McKenzie there that morning?

A. He had been there. He was there when we first started but he didn't stay all the time. He showed us

what to work. He asked about the ties and showed us where they needed to go, then he left.

Q. He didn't tell you about how you needed to do your work out there, did he?

A. No sir, he said that he knew that I knew more about it than he did.

Q. And you fixed it according to Coastline specifications, didn't you?

A. Yes sir, so it would be safe for trains.

Q. Was there any significance for repairing that track [fol. 134] at this time of the year?

A. I don't quite understand.

Q. Why was it necessary to repair that track at this time of the year?

A. Well, Mr. McKenzie leased this track—I guess that is what you would call it—anyhow, he let those farmers load watermelons out there on that track and he always repaired it every year before watermelon time.

Q. Watermelons were loaded on this side track?

A. Yes sir.

Q. In Coastline cars?

A. Yes sir, in railroad cars.

Q. And pulled out by railroad engines?

A. Yes sir.

Q. Coastline trains?

A. Yes sir.

Q. And that is why you had to repair it every year just before watermelon season, wasn't it?

A. Well, it was unsafe for use at that particular spot for trains.

A. It was unsafe for the Atlantic Coastline trains to go on?

A. Yes sir, right there at that particular spot.

[fol. 135] Q. You inspected it and you knew that it was unsafe?

A. Yes sir.

Q. And that was your job, wasn't it?

A. Yes sir.

Q. And it was your job always to see the main line was safe for Coastline trains and everything tied into the Coastline main line on which the Coastline trains were going to move?

A. Yes sir, we inspect the entire tracks.

Q. Mr. Keene, how much did one of those cross-ties weight?

A. How much did a cross-tie weigh?

Q. Yes.

A. Well, they are different sizes and different weights. They would weigh anywhere, I would say—I never weighed one, this is just my idea—from a hundred pounds up to maybe two fifty.

Q. You told me at Bronson the other day that they averaged around one hundred seventy-five to two hundred pounds, didn't you?

A. If you average them up.

Q. Now, Mr. Keene, you saw Ray when he came off that Saturday morning. Now, was it at that time that he told you [fol. 136] that he would not be out on Monday, or was it later in the day that you saw him?

A. Mr. Faircloth, I am not positive. It was sometime, I don't believe it was then, I believe it was that afternon. To the best of my knowledge it was that Saturday afternoon when I met him up there around the store.

Q. All right, you saw him twice on Saturday after he left the job?

A. Yes sir.

The Court: Where did you give him the money?

A. On the street outside the bank.

The Court: Outside the bank. You didn't go down to the tool house of the Coastline and pay him off there?

A. No sir.

The Court: You were confusing in your testimony awhile ago and I wanted to straighten that out. You did go down to the tool house and paid the others off?

A. I paid the others off out there in front of the tool house when they put up the tools.

The Court: When they put up the tools but this plain-[fol. 137] tiff was not there at that time? Or had you seen him before?

A. Before I went there. He got off up town there and I met him between the bank and the depot.

The Court: He got off up town and went to the bank where you were getting the check cashed?

A. No sir, he was coming back toward the bank as I came out of the bank.

The Court: And that's where you ran into him?

A. Yes sir.

The Court: And your testimony is, that was before you went to the tool house to pay the others?

A. Yes sir.

The Court: Excuse me, Mr. Faircloth. Go ahead. It was confusing to me awhile ago and I was afraid it might confuse the jury.

Mr. Faircloth Continuing:

Q. Now, at least to the best of your recollection, you know that you saw him to pay him off and again you saw him later in the afternoon and that is when he told you he [fol. 138] wouldn't be there Monday?

A. Yes sir.

Q. Mr. Keene, who were you working for out there that day?

A. Mr. D. P. McKenzie.

Q. Now, did you see D. P. McKenzie in person and make arrangements?

A. Yes sir, he is the gentleman that called me.

Q. And it is your contention that you were working for D. P. McKenzie?

A. Yes sir.

Q. Why do you say that?

A. Because he was the owner of the track.

Q. He owned the track?

A. Yes sir.

Q. Did he pay you?

A. D. P. McKenzie the best I remember.

Q. D. P. paid you?

A. Yes sir, on that particular morning I am pretty sure that D. P. McKenzie was the man that paid me.

Q. You are pretty sure?

A. Yes sir, on that particular morning. There is one time in there, I believe it was just before this that Mr. [fol. 139] Perry Fugate paid us for the work, just on one occasion. On this particular morning the best I remember I got the check from Mr. McKenzie and went and got it cashed and paid it just as I told you just now.

Q. You were paid over-time above your Coastline pay for the time you worked out there?

A. Well, they paid us time and a half of our regular rate of pay.

Q. Did you get anything extra than your usual pay?

A. No siree.

Q. You got just what you would have gotten if you had worked for the Railroad, time and a half?

A. Yes sir.

Q. The only difference is you get it in cash?

A. Got it from Mr. McKenzie.

Q. And you had the railroad tools?

A. Railroad tools.

Q. Fixing the sidetrack there, preparing it for the safety of Atlantic Coastline trains?

A. Yes sir.

Q. So the Coastline trains could go on there?

A. Yes sir.

Q. And haul watermelons off?

[fol. 140] A. Yes sir.

Q. It was the edge of the watermelon season, is that correct?

A. Yes sir.

Q. And you had your regular crew out there?

A. Sir?

Q. You had your regular crew out there?

A. I am pretty sure I had those three and Ray Ward.

Q. And you were putting these ties in like you did every day of the week?

A. We hadn't placed any ties on our track, the main track, in some two or three weeks.

Q. But you had done it?

A. Yes, I had done it and placed them in the same way that we did out there.

Q. Well, did D. P. McKenzie tell you how far apart he wanted those ties on that sidetrack?

A. How far apart?

Q. Yes.

A. He told me that he wanted them fixed in a way that the Coastline wouldn't have any objection to placing their trains out there.

[fol. 141] Q. So you fixed it so that Coastline trains could go out there?

A. Yes sir.

Q. That's all you were doing?

A. Yes sir.

Q. So he was not directing or supervising your work in any way?

A. He told us he wanted it fixed and showed us the ties and the places and we fixed it.

Q. And the reason that he was willing to shell out this money to pay you to fix it was because he wanted Coastline trains to go on there and get watermelons, wasn't it?

A. Yes sir, that was the only train that used the track, the Coastline.

Q. And you wouldn't allow it, you would spike the switch before you would let a Coastline train go in there on an unsafe track, wouldn't you?

A. Absolutely.

Q. And you have already told me that it was a part of your duties and responsibilities was for the safety and maintenance of all tracks the Coastline trains were going on?

A. For safety maintaining the whole company owned tracks and inspecting the privately owned tracks.

[fol. 142] Q. And for those tracks where you knew Coastline trains would go?

A. Yes sir.

Q. And you would inspect it to see if it was safe for a Coastline train to go on, wouldn't you?

A. Yes sir.

Q. And if it wasn't you wouldn't allow them to go on there until they were made safe?

A. No sir, not until they were made safe.

Q. Did you ever tell Ray Ward that he was working for Perry Fugate out there on that track?

A. Perry Fugate?

Q. Or that he was working for Perry Fugate and you were working for Perry Fugate out there on that track?

A. No sir, I told him he was working for D. P. McKenzie but Perry Fugate did pay us that one time for working out there because he was going to load on that track.

Q. Now, when did you tell him that?

A. Well, the day we worked out there. We worked out there on two or three different occasions. Not only this particular time but two or three times before that and there was one time that Perry Fugate paid us and that was the time we put in about all day.

Q. All right now, when did you tell him, when you got [fol. 143] out there that morning to the siding?

A. When we got on the job. I always tell them that they are on a private track, and the railroad company is not responsible for us; we are on our own, and we don't have to work there if we don't want to.

Q. Do you tell them to be careful?

A. Tell them to be careful and don't get hurt.

Q. Because they are not working for the railroad?

A. That's right.

Q. Now, you told him that morning?

A. Yes sir.

Q. Well, did you tell them that on Friday afternoon when you told them to report for work Saturday morning?

A. When I told them to report?

Q. Yes?

A. I told them on Friday afternoon that Mr. McKenzie wanted us to put nineteen ties under on his track up there and I told them two or three of us could do it but "do all of you want to work or just part?" "If all of you don't want to work, just part, and meet me up there and we will fix it."

Q. Did you tell them then that they would be working for Mr. McKenzie?

[fol. 144] A. Yes sir. They knew they were going to be working for Mr. McKenzie.

Q. Because you told them, that is the way they knew it?

A. Yes sir.

Q. Were they with you when you made the deal with McKenzie?

A. Some of them would have had to be.

Q. Was Ray Ward with you?

A. I am not sure whether Ray was with me at the time that McKenzie came to talk with me about it and asked if we would fix it for him or not.

Q. How did McKenzie know that it needed any repair?

A. Well, he saw him out there.

Q. I mean, how did McKenzie know that his track needed repairing?

A. When we inspected it and found it unsafe we went by there—it is my duty to go to him and tell him.

Q. Well then, you told Ray twice that he was working for Mr. McKenzie?

A. Every time that he worked out there I told him that he was working for McKenzzie.

[fol. 145] Q. You told him on Friday afternoon, you told him again on Saturday morning?

A. I am not sure I told him on Friday afternoon. I am pretty sure that I told him that McKenzie wanted us to work and he could work if he wanted to.

Q. At any rate, you know that you told him that morning?

A. Yes sir.

Q. You are not sure that you told him the afternoon before?

A. I am not sure if I told him then but I told him there was some work up there on that track that we could do for Mr. McKenzie if he wanted to work.

Q. Did you tell him that you were going to get overtime for it?

A. Yes sir. I told him that Mr. McKenzie would pay us time and a half for it.

Q. Did you tell him to meet you at the tool shed?

A. No sir.

Q. Where did you tell him to report to?

A. I told him that he could meet us or he could come down there and go with us. We went to those jobs on our private [fol. 146] automobiles. I went in my car and he either could go in his or with some of the men.

Q. Now, does the railroad have any side tracks of its own in Chiefland?

A. Yes sir.

Q. Isn't it a fact, that on those little side jobs, working for a whole day, working right in town, that you wouldn't get out the motor car and put it on the mainline?

A. No sir, you don't use those motor cars after working hours only in an emergency.

Q. That is what I am getting at Mr. Keene. I don't think you understand. If you had a day's work in Chiefland on the Coastline owned sidetrack, would you drag

out that motor car to take your men right there in town to do this work or would you go in your own car?

A. If the Coastline called us to work on one of their sidetracks on Saturday, we would take the Coastline motor car.

Q. You would take the car and go even though you were right there in Chiefland?

A. Yes sir, but when you leave the tool house when you are working for the Coastline Railroad you take the motor car and push car with tools.

[fol. 147] Q. All right, this Saturday morning you loaded the tools on Frank Richardson's pick-up, didn't you?

A. Yes sir.

Q. Do you remember whether Ray went with you, in his own car, or in the pick-up?

A. I believe that he come up there in his own car. I believe that he did.

Q. You think he had his own car?

A. I think he went up there in it or some of his folks carried him one. I believe that morning he met us at the job.

Q. Mr. Keene after he went to the hospital did you ever hear from him again?

A. I saw him a time or two, I mean when he would get back down in Chiefland, yes sir.

Q. Did he ever say anything to you about a transfer?

A. Yes sir.

Q. What did he say?

A. He said he wanted to transfer whenever he got out of the hospital to the transportation department. He said that he understood he could get on over there as a fireman.

Q. As a fireman?

A. I believe that was what it was.

[fol. 148] Q. He told you that he thought he could get on as a fireman in Ocala?

A. Ocala, I believe it was High Springs where they put him on.

Q. All right, and he asked you for a transfer?

A. Yes sir, he asked me if I would help him to get a transfer.

Q. Well, did you?

A. I talked to Mr. Sanders about it and he said "well,

if the man doesn't want to work for us and wants a transfer, he wants to transfer."

Q. You told him to do that?

A. I told Mr. Sanders that Mr. Ward wanted to transfer from the roadway department to the transportation department.

Q. And he said that if he didn't want to work for you and wanted a transfer by all means to give him a transfer?

A. Yes sir.

Q. Did Mr. Sanders okay the transfer?

A. I don't know whether Mr. Sanders okayed the transfer or not. I made a 94 form out showing that he was willing to transfer if they wanted him.

Q. Do you know whether or not he was transferred?

[fol. 149] A. No sir. I gave Mr. Ward one copy of it, kept one, and sent Mr. Sanders one.

Q. And that is the last that you knew about it?

A. The last I knew about it.

Q. Well, you knew that he wasn't working for the railroad, didn't you?

A. I learned later. I hadn't seen Mr. Ward but every now and then, not very often.

Q. You don't know what he was doing but you knew that he wasn't working for the railroad?

A. I understood he was working for Mr. Luther White.

Q. Where is D. P. McKenzie?

A. Where is D. P. McKenzie, now?

Q. Yes?

A. He is dead now.

Q. Where is Perry Fugate?

A. He is dead.

(You may examine).

The Court: Any questions, Mr. Dell?

Mr. Dell: Yes, Your Honor.

Cross-examination,

By Mr. Dell:

[fol. 150] Q. Mr. Keene, I believe you testified that your normal work week on the Coastline was Monday through Friday?

A. Monday through Friday, eight hours each day.

Q. When you finished your normal work on Friday afternoon what was the next regular scheduled time for you and your crew to go to work for the Coastline?

A. 7:00 o'clock, Monday morning.

Q. Unless there was some emergency between Friday afternoon when you knocked off to 7:00 o'clock Monday morning, you and the members of your crew were on your own free time, is that correct?

A. Yes sir, to do as we pleased.

Q. Now, on this particular Friday afternoon before you worked on the M&M track that Saturday morning, May 22nd, 1954, how did you arrange about the time that you were going to work the next morning?

A. On that private track?

Q. Yes?

A. I asked all of them that wanted to work what time would they rather start, how soon they wanted to get through, so we would be off to go on about our business. If they wanted to go early, to set the time, that they could go.

Q. It was completely up to the men what time you went [fol. 151] to work?

A. Yes, they could start at 5:00 o'clock, 4:00 o'clock, or 7:00 o'clock, whatever they wanted.

Q. Did it have any effect on a man's job with the Coastline whether he worked on that private track that day or not?

A. None whatsoever.

Q. He could go fishing or wherever he wanted?

A. Yes sir. He could go fishing or anything.

Q. When Ray Ward first came to work with your crew I believe you said it was in the latter part of 1953, the year before?

A. The 16th day of December, I believe it was.

Q. Of 1953?

A. Yes.

Q. And he came to you as an apprentice foreman?

A. Yes sir.

Q. Now, did you do anything to show him about what his duties were going to be?

A. Yes sir.

Q. Did you work along side of him for awhile?

A. Yes sir.

Q. Did you show him how to use the tie hooks?

A. Yes sir.

[fol. 152] Q. When a man on your section crew, particularly your section crew, is working on putting in ties, does he work by himself or does he have somebody working with him?

A. He works by himself.

Q. Works by himself?

A. All the time.

Q. Do you know of any place in your experience of twenty years that you have been working for the Coastline where you had two men working on a regular size cross tie putting it in?

A. Not on a regular size cross tie. On long switch ties about twice the length of a cross tie.

Q. Where they are twice as long and twice as heavy you use two men?

A. Two men on those, yes sir.

Q. Now, you instruct the men to turn their backs to the track after they first dug the hole where the tie is to go in, made the bed for the tie, do you instruct the men to put their backs to the railroad track and bend their knees down and grab the tie with the tie hooks?

A. Yes sir, their back to the track and slide it in.

Q. Now, you say slide it in, are you supposed to jerk it or slide it?

[fol. 153] A. Catch it somewhere about the middle so the front end will be a little heavier and lay on the bed and it will slide right under.

Q. Now, do you jerk it or snatch it?

A. No sir.

Q. Do you tell them to jerk it or snatch it?

A. Tell them not to jerk it.

Q. Did you tell Ray Ward not to jerk or snatch it?

A. Yes sir, when he first reported to work for me I told him the proper way.

Q. Now, Mr. Keene, suppose that you were putting a tie in a track, under a track right there by those steps, and the tie was laying right out here and you already had your bed dug under there, what would happen if you got down

on the tie facing the track and put the tie hooks on the tie like that, would that be the way to do it?

A. No sir, you wouldn't get very far that way.

Q. Why wouldn't you get very far?

A. That would be the improper way to do it.

Q. What would happen?

A. The hooks are liable to slip off and strike you on the head.

Q. Have you ever seen anybody put a tie under the track [fol. 154] facing the track?

A. I have seen them try it and slip off and fall over in the track.

Q. Who furnished those ties out there that morning you put under the M & M track?

A. Mr. D. P. McKenzie.

Q. Where did he get them from?

A. Cut them at his saw mill. He runs a saw mill down there about middle of his track.

Q. Did he have the ties out there on the track?

A. He had his saw mill haul those ties in and placed them where I had told him they needed to be replaced.

Q. And when you and the men got there the next morning, that Sautrday morning, the ties were already in place?

A. Yes sir, the ties were where they were to be replaced.

Q. Now, Mr. Keene, is this track on a grade with ditches on either side of it?

A. No sir, it is flat, flattened off by a bull-dozer on either side.

Q. Are there any rocks or ballasts, cinders or anything like that on them?

A. No sir, all clean.

[fol. 155] Q. Do you know where in relation to the M & M track that Ray Ward was working that Saturday morning the 22nd of May?

A. Yes sir.

Q. Where?

A. Well, you might call it a dog pen that is what it served its last purpose for, it was built for a hog pen market, stock yard whatever you call it, right side of the track, just below is a little dirt road that comes along on the west end of it, and he was working just off of that crossing west of the crossing.

Q. He was working just west of the crossing?

A. Yes sir.

Q. Was that on the Atlantic Coastline Railroad right-of-way?

A. No sir, it was on the McKenzie land.

Q. On Mr. McKenzie's land?

A. Yes sir.

Q. How far west of there was the Atlantic Coastline right-of-way?

A. Well, offhand, I never did measure it.

Q. Just estimate it?

A. Just offhand I would say it was a hundred feet or [fol. 156] better.

Q. A hundred feet or better to the nearest property owned by the Coastline Railroad?

A. Yes sir.

Q. Now, did you have to use any spikes in putting in those ties?

A. Yes. sir.

Q. Where did you get the spikes from?

A. Pulled them out of the old ties and put the same spikes back in the new ties.

Q. You didn't use any new spikes or any additional spikes than the ones that were already in the old ties?

A. Yes sir.

Q. Who had the right to start you or stop you on that work on the M & M track?

A. Mr. D. P. McKenzie.

Q. He is the man I believe you told Mr. Faircloth that you made the arrangements with about going out there?

A. Yes sir.

Q. Did anyone connected with the Atlantic Coastline Railroad Company tell you to repair the M & M Turpentine track that afternoon?

A. No sir.

Q. You are sure that Mr. Sanders the Roadmaster didn't [fol. 157] say anything to you about it?

A. That I had to go out there and repair that track, no siree.

Q. Now, wasn't anything different about the type of work that Ray Ward was doing on this particular Saturday

morning then he did normally when he worked with your crew, was there?

A. No sir, no different.

Q. Have you ever worked on a private track any other day than Saturday?

A. No sir.

Q. Have you ever worked any members of your crew on private tracks any other day other than Saturday?

A. No sir.

Q. Now, when you work for the railroad how did you get paid, in cash?

A. No sir, in check, on the 15th and around the 1st of each month.

Q. Did your men get paid the same way?

A. Yes sir.

Q. Where did you normally get your checks at?

A. Depot in Chiefland.

Q. In Chiefland?

A. Yes sir.

[fol. 158] Q. When you worked on these private tracks were you paid, at any time, by Coastline check?

A. Never was, no sir.

Q. You were paid by the people who owned the track?

A. People who owned the tracks and hired us to do the work.

Q. Then did you normally in turn pay the men?

A. I would pay them when they put all of our time in one check. Sometimes they would put them in individual checks.

Q. Then you would just distribute the checks?

A. Yes sir.

Q. I believe you said that Mr. Fugate one time paid in cash?

A. Yes sir.

Q. Did you just divide the cash up?

A. Yes sir. They would take each one of our time and figure up how much each one was supposed to get and they would give us the money and the list, and each man would get his share.

Q. Now, you were working that morning with the Coastline tools?

A. Yes sir.

[fol. 159] Q. And they were the same tools that you worked with on your regular job?

A. Yes sir.

Q. What was the condition of those tools, did anybody on this particular day say anything to you about any tool not being in proper shape?

A. No sir.

Q. Did you inspect the tools as they loaded them out of the tool house on Richardson's truck?

A. Yes sir.

Q. And they were in good shape at that time?

A. Yes sir.

Q. Did you inspect the tools when they were taken back to the tool house and you went down there to pay the boys off?

A. Yes sir.

Q. And they were all right then?

A. Yes sir, and to see that they put everyone back.

Q. They were in good shape when you put them back in?

A. Yes sir.

The Court: While you are thinking we are going to take [fol. 160] a ten minutes recess.

(After recess the following proceedings were had):

The Court: Be seated, please. All right, Mr. Dell, go ahead.

Cross-examination:

By Mr. Dell:

Q. Mr. Keene, did you have any knowledge on that Saturday morning when you were working on the M & M Turpentine track on May 22nd, 1954, that Ray Ward had hurt his back?

A. No sir.

Q. Did he say anything to you that morning about hurting his back?

A. No sir.

Q. Had he ever complained about his back prior to that time?

A. Yes sir.

Q. What did he say?

A. Well, he told me pretty soon after he first started working with me, he was toting a jack down a hill to put under a tractor to jack it up one day, and he complained about his back was hurting and I asked him what was the matter with his back and he said that he had hurt it. He said he hurt it about three years before that time playing on a third base while he was playing baseball at Gulf Ham- [fol. 161] mock, Florida. He slid on third base.

Q. When you paid Ray Ward for his work on the M & M Turpentine track that morning was when you came out of the bank?

A. Yes sir.

Q. Did he say anything at that time about his back being hurt?

A. No sir, none whatever.

Q. Did he say anything to you about riding him home?

A. No sir.

Q. Now, in June, after that, did you say that he worked a half day for you?

A. He worked to around 2:00 o'clock.

Q. Did he say anything that day when he was back working for you that he had hurt his back?

A. No sir. He said he was not feeling well and he was going home.

Q. Now, I believe you testified after he left your section he went down to the Gulf Hammock section and worked on the section crew down at Gulf Hammock?

A. Yes sir.

Q. Did you have an occasion in July, 1954, to work your [fol. 162] crew with the ones working on the Gulf Hammock crew?

A. Yes sir.

Q. Where were you working that day, Mr. Keene, do you remember?

A. Yes sir. Just south of Herschel, Florida.

Q. Was Ray Ward working with that crew that you went down to work with?

A. Yes sir, he was working with Mr. J. W. Green's crew at Otter Creek.

Q. Did you have an occasion at that time to talk with Ray Ward about his alleged back injury?

A. Yes sir.

Q. Who was present at that time?

A. Mr. Ward, Mr. J. W. Green and myself.

Q. What did Ray Ward say?

A. I asked him when he was going over in the shade, I said, "boy what is the matter" and he said he wasn't feeling well, his back was bothering him. I said did you hurt your back on the railroad track and he said, no I slid in on a baseball base playing baseball at Gulf Hammock and it has always bothered me ever since.

Q. That was in July of 1954?

A. Yes sir. I said to him, I said, "then you never did hurt your back while you were working on a railroad [fol. 163] track"? And he said "no, I wish I had".

Q. He said he wished he had?

A. Yes sir.

(Your witness)

The Court: Any questions, Mr. Faircloth?

Redirect examination:

By Mr. Faircloth:

Q. Mr. Keene, this track we are talking about here at Chiefland, part of it belonged to the railroad, didn't it?

A. This M & M track?

Q. Yes?

A. Only the switch where it comes off the other track.

Q. In other words, there is part of it coming off the main line track up to the Coastline?

A. In other words, the M & M track hooks on the Coastline track a hundred and fifty feet from the point of the switch.

Q. Mr. Keene, I want to show you two photographs here and ask you if you can identify them? Do you recognize that as being the siding where you fellows were working?

A. Yes sir.

Q. Both of them?

[fol. 164] A. This top one—this one I recognize very well. Let's see——

Q. Aren't you standing in one of them?

A. I am standing right here on this one (indicating). Yes sir, I recognize them both.

Mr. Faircloth: Thank you, sir. I would like to tender them in evidence as exhibits.

The Court: Any objection, Mr. Dell?

Mr. Dell: Your Honor, I have no objection to them but I don't believe that he has laid a proper predicate for their introduction. May I ask the witness a question?

The Court: Go ahead.

Examination.

By Mr. Dell:

Q. Mr. Keene, is this a fair representation of the M & M Turpentine track where you all were working on this May 22nd, 1954?

A. Yes sir, this one here seems to be.

Q. Is this a fair representation showing the Coastline track and the M & M siding, or side-track, coming off of it, as it existed on May 22nd, 1954?

A. Yes sir, this one here seems to be a front view from [fol. 165] off the Coastline track on to the switch where it turns on. This one here is a side view of the M & M track and that is the Coastline track over here where the cars are placed for loading logs.

Mr. Dell: I have no objections.

The Court: Let them be received in evidence.

Received in Evidence and Marked Plaintiff's Exhibits Nos. 4 and 5.

Mr. Faircloth Continuing:

Q. Mr. Keene, referring to Plaintiff's Exhibit No. 5, would you tell me what that represents? That's looking in what direction?

A. Well, that is looking south out of the north from where the track leads off to the left coming out of the north.

Q. I see. And the Coastline part of the track swerves off to the left in that picture, doesn't it?

A. Coming from the north, yes sir, it turns off the Coastline track to the left.

Q. Do you see in there a little street or crossing over the side track?

A. Yes sir, it is further down, way down. Way down [fol. 166] you will notice an old shed, old flat shed that looks like a roof down here, the crossing is at this end.

Q. Is that the crossing shown in that picture?

A. Yes sir, that is the crossing.

Q. All right, you all were working between that crossing and the main line, weren't you?

A. Yes sir, just north of the crossing.

Q. All right, and about how many feet does the Coastline own there from the main line?

A. The Coastline?

Q. Yes?

A. The Coastline comes right here, Mr. Earl, where these rails turn in up here to make the switch. From the point up here to here runs 150 feet and that is just about where it comes in here to a thirteen it looks there.

Q. A hundred and fifty feet is the part the railroad owns?

A. Yes sir.

Q. Now, about how many feet from the end of this hundred and fifty feet stretch does the Coastline own where these men were working?

A. From the end of where the Coastline stops?

Q. That's right?

A. Well, the way it comes around there angling I would [fol. 167] say at least a hundred and fifty or sixty feet from the curve but straight across I would say approximately seventy-five or eighty feet to the railroad right-of-way.

Q. Mr. Keene, you told us you were using railroad tools that day, whose permission did you have to use these tools of the Atlantic Coastline Railroad to work on Mr. McKenzie's side track?

A. The Coastline never did object to us using those tools for that purpose.

Q. Would it be fair to say that you were using them with their permission?

A. Well, I didn't ask them for their permission to use them.

Q. Did they know that you were using those tools out there to work on these side-tracks?

A. They knew we used the tools, yes sir.

Q. Well now, who knew it?

A. Mr. Sanders.

Q. Your boss?

A. Yes sir, he knew we used them.

Q. He said that it was all right to use them, didn't he?

A. Well, I never did ask him if it was all right to use them.

[fol. 168] Q. He knew you were doing it so you didn't say anything about it, so you assumed it was all right?

A. I assumed so.

Q. You never did pay any part of this money you received from McKenzie's siding as rent on these tools, did you?

A. No sir, none whatever.

Q. You used them free?

A. Free of cost.

Q. Mr. Keene, when you go out to put ties on the main line track, how do you get the ties down there in position to go under the main line track?

A. On our track?

Q. Yes?

A. They ship them to us in gondola cars, similar to this car you see in this picture here.

Q. How do you get them off of these cars?

A. We get up in there and throw them out by hand.

Q. Does one man do it?

A. One man to the end of the tie and lift it over the side of the car.

Q. But two men on a tie?

A. Well, if the other end doesn't slip over the other one lifts it over, yes sir.

[fol. 169] Q. You told me that you saw Jesse McBride up here a few days ago, didn't you?

A. Yes sir, I believe it was Monday.

Q. Did you talk to him about this matter?

A. No sir.

Q. Not at all?

A. No sir, I didn't.

Q. You didn't ask him whether or not he saw Ray Ward talking to you?

A. No sir.

Q. You have no knowledge of that?

A. No sir.

Q. Is he still in town, do you know?

A. I don't know. I just saw him Monday afternoon.

Q. Didn't McBride tell you that he saw Ray Ward come up to you and tell you that he was hurt that day?

A. No sir, he did not.

(That's all)

The Court: Any questions, Mr. Dell?

Cross examination.

By Mr. Dell:

Q. Mr. Keene, all of the men that were working with you [fol. 170] that morning were working East of the Coastline Railroad right-of-way?

A. Yes sir.

Q. Is there any marker along the Coastline right-of-way to tell the limits of the right-of-way?

A. Concrete posts. I would say it was maybe eight inches square that sits up there. I don't know but there are probably three or four hundred feet apart all along there, along the right-of-way sitting up about two feet out of the dirt.

Q. When you saw Ray Ward working on this track that particular morning; you say, I believe, he was working down by the little road crossing?

A. Yes sir.

Q. On the M & M Turpentine Company side?

A. Yes sir.

Q. That was not on the Coastline property?

A. No sir.

Q. How far away from the Coastline property was that?

A. I never did measure it but I would guess between seventy-five and eighty feet.

Q. And to your knowledge he was not working on Coastline property?

[fol. 171] A. No sir, not that morning.

Q. I refer to Plaintiff's Exhibit No. 4, it shows a roadway for motor vehicles to cross the railroad track, is that

the crossing that you refer to about where Ray Ward was working?

A. That's it, yes sir. Right here between here and where I was standing. (indicating) Same crossing where I am standing.

Q. Would you hold that up and just put your finger on it and point it out so the jury can see it?

A. This way (indicating)?

Q. Yes, hold it up so the jury can see it.

A. This is the dirt road crossing the M & M track right here. And Mr. Ward was working between this crossing and where you see me standing right there. The end of the Coastline right-of-way is way up here, just this side of the telephone pole you can see. See the telephone pole there. (Indicating on picture). The concrete marker shows Coastline right-of-way is just back a few feet from that pole right there.

Q. And you were standing closer to the Coastline right-of-way than Ray Ward was working?

A. Yes sir, from where he was working that morning.

Q. And where you were standing was off of the Coast-[fol. 172] line right-of-way?

A. Yes sir.

Q. And a hundred and fifty feet of track coming out on this spur that the Coastline owns that you testified about?

A. Yes sir.

Q. Is that all within the Coastline right-of-way?

A. Yes sir, every bit of it.

(Your witness)

Mr. Faircloth: Just two questions, Your Honor.

Redirect examination.

By Mr. Faircloth:

Q. Mr. Keene, did you ever tell Mr. Colson in Waycross that you all were working for Perry Fugate that day, the day Ray got hurt?

A. No sir, Mr. Colson didn't ask me.

Q. Did you ever tell Ray that you were working for Perry Fugate out there that day?

A. No sir, I told him we were working for Mr. D. P. McKenzie out there that day.

(That's all)

The Court: Come down. Call your next witness.

Mr. Faircloth: Your Honor, the plaintiff at this time [fols. 173-242] would like to introduce the deposition of Dr. William G. Aten.

The Court: All right. You want to be the witness?

Mr. Faircloth: Yes sir. Would your Honor explain to the jury what this procedure is?

The Court: Yes sir. Counsel has taken the deposition of a witness that lives far enough away from here, he was required to take the deposition of him instead of being forced to bring him here as a witness. I would like counsel over there when he starts to read it to name the witness and they will read his testimony.

Mr. Faircloth: Thank you, Judge.

Mr. Rutledge: This is the deposition of Dr. William G. Aten, taken in Miami, Florida.

DEPOSITION OF TESTIMONY OF DR. WILLIAM G. ATEN

(omitted per designation)

* * * * * * *

[fol. 243] MRS. RAYMOND WARD was the next witness called and after being first duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Faircloth:

Q. Please state your name?

A. Helen Ward.

Q. Mrs. Ward you are the wife of Raymond Ward, the plaintiff here?

A. That is right.

[fol. 244] Q. Helen, how long have you all been married?

A. A little over four years.

The Court: You talk loud enough for all those jurors to hear you, please mam.

Mr. Faircloth Continuing:

Q. How long did you say you all have been married?
A. A little over four years.
Q. How many children do you have?
A. Two.
Q. How old are they?
A. Two and three and a half.
Q. Helen do you recall where you were living in 1954?
A. Yes.
Q. Where was that?
A. We were living in Chiefland, Florida.
Q. Do you recall what Ray was doing at the time, in May of 1954?
A. Yes, working for the railroad.
Q. Which railroad?
A. Atlantic Coastline Railroad.
[fol. 245] Q. How long had he been there working in Chiefland for the Coastline?
A. We went there in December, 1953.
Q. He had been working since that time?
A. Yes, that's right.
Q. Do you know what his position was?
A. Apprentice foreman.
Q. Learning to be a foreman?
A. Yes, that's right.
Q. Helen do you remember the day in May of 1954 when Ray got hurt while working on the railroad?
A. Yes sir.
Q. Do you remember the date?
A. May 22nd.
Q. Do you know what day of the week was it?
A. Saturday.
Q. How did you find out about his injury?
A. Well, he came in as I was fixing dinner.
Q. About what time of the morning was it?
A. It was a round 11:00 o'clock. I can't be sure.
Q. And where was he when you first saw him?
A. Standing in the doorway of the kitchen.
Q. In the doorway of the kitchen?

[fol. 246] A. Yes, he had come through the living room into the kitchen.

Q. Did you notice anything abnormal about his condition?

A. Well, he was bending over with his hands on his back and looked like he was in pain.

Q. Did you ask him what his trouble was?

A. Yes.

Q. What did he tell you?

A. He told me that he had hurt his back.

Q. Did he tell you how?

A. He said he was putting in a tie.

Q. Well, what did you do then?

A. Well, he went to bed and I called the doctor.

Q. You called the doctor?

A. Yes.

Q. And this was about what time, around 11:00 o'clock?

A. I would say somewhere around 11:00.

Q. And what doctor did you call?

A. Doctor Farnell in Chiefland.

[fol. 247] Q. Did Doctor Farnell come out?

A. Yes.

Q. Tell the jury what happened when Dr. Farnell got there?

A. Well, he came out and examined his back and told me to put a kidney plaster on it.

Q. Did you get a kidney plaster?

A. Yes.

Q. Go down town and get it?

A. Yes.

Q. Did you all have a car at that time?

A. No, I walked.

Q. You walked to town?

A. Yes.

Q. You didn't own a car at that time?

A. No sir.

Q. You brought the kidney plaster back and put it on him?

A. Yes.

Q. Did that help him any?

A. No.

Q. Did he stay in bed the rest of that day?

[fol. 248] A. Yes.

Q. Did he leave the house at any time during the rest of that day?

A. No.

Q. Did you see Mr. I. H. Keene on that day?

A. Yes, he came that Saturday afternoon to pay Ray.

Q. He came to your house that Saturday afternoon to pay Ray?

Q. You positively remember that?

A. Yes, I opened the door and let him in.

Q. You opened the door and let him in?

A. Yes.

Q. Did he go into Ray's bedroom?

A. He went in the door from the porch leading in there.

Q. You opened the door and let him in—did you see him pay Ray?

A. He gave the money to me.

Q. You took the money from Mr. Keene?

A. Yes.

Q. Is there any doubt in your mind about that?

[fol. 249] A. No.

Q. Did you hear any of the conversation between Keene and Ray that day?

A. If I heard anything I don't remember it.

Q. Well, did he stay in bed on Sunday?

A. Yes, he stayed in bed.

Q. All day Sunday?

A. Yes sir.

Q. When did he get out of bed?

A. Well, he got out Monday when he went to the doctor.

Q. What doctor did he go to?

A. Doctor Manchester.

Q. Doctor Manchester here in Gainesville?

A. That is right.

Q. How did he get up here?

A. I believe he went with Lyle Lathrop, I am not sure.

Q. Now, who is Lyle Lathrop?

A. Depot Agent.

Q. For the Atlantic Coastline Railroad?

A. Yes sir.

Q. Mr. Lathrop brought him to Gainesville?

[fol. 250] A. I think so. I can't remember.

Q. What was your condition at that time?

A. Well, I was expecting a baby in June.

Q. Well, what happened after he came to see Dr. Manchester?

A. Well, he didn't get any better.

Q. Was he able to go back to work?

A. Not right straight.

Q. When did he go back to work?

A. I don't remember just when, it wasn't too long afterwards when he went back for just one day but he couldn't stay the whole day.

Q. He didn't make a full day?

A. No.

Q. Do you know why?

A. Because the work was too hard.

Q. All right, did he go back to work after that?

A. Not in Chiefland.

Q. Did he go back to work anywhere?

A. He went down to Gulf Hammock.

Q. Did he get along all right after he went to work at Gulf Hammock?

A. His back still bothered him.

[fol. 251] Q. Was he able to sleep on the bed?

A. Well, we took the mattress off of our bed and put it on the floor and he slept there.

Q. And he slept on the floor while he was working at Gulf Hammock?

A. Yes.

Q. How long did he continue to work there at Gulf Hammock with that section crew?

A. I think he worked there until November—around November when he went to the hospital in Waycross.

Q. Why did he wait all that time to go to the hospital?

A. Well——

The Court: That calls for an opinion.

Mr. Faircloth Continuing:

Q. Then he went to the hospital in early November in Waycross?

A. Yes sir.

Q. Waycross, Georgia?

A. Yes.

Q. And how long was he up there?

A. About six months.

[fol. 252] Q. Had you had your baby by then?

A. Yes.

Q. What did you and the baby do while he was in the hospital?

A. We lived at my mother's.

Q. With your mother?

A. Yes.

Q. Did he have any parents you could live with?

A. No, they were both dead.

Q. When *you* got out of the hospital did he go back to work with the railroad?

A. No. He got a transfer but it was not okayed.

Q. The transfer was not completed?

A. No.

Q. Did he go to work some place after the transfer didn't go through?

A. He later went to work for Luther White.

Q. White Construction Company?

A. That's right.

Q. In what capacity?

A. He started out driving a truck.

Q. And has he been with them since that time?

A. That's right.

[fol. 253] Q. Does he get along all right now?

A. His back still bothers him. I have to rub his back quite often and he sleeps on a heating pad very often. And he can't play with the children, he has to be very careful and not make an awkward movement.

Q. Is he affected some parts of the day—than others?

A. Yes, it is worse during the morning and then in the afternoon when he comes in.

Q. Worse when he comes in in the afternoon and in the mornings?

A. Yes.

Q. What is there about his condition that brings it to your attention?

A. Because I have to put his shoes on and take them off.

Q. In the evening and in the morning?

A. That's right.

Q. Why is that?

A. He can't reach down to put them on and pull them off.

Q. Helen when was the last time that you had to put his shoes and socks on?

[fol. 254] A. About two weeks ago.

Q. He got up one morning and couldn't put his shoes and socks on?

A. That's right.

(You may examine).

The Court: Any questions?

Mr. Dell: Yes sir.

Cross-examination.

By Mr. Dell:

Q. Mrs. Ward, you say Mr. Keene came to your house that Saturday afternoon and brought Ray's money?

A. That's right.

Q. What form was that money in?

A. $1.00 bills.

Q. In cash?

A. Yes.

Q. Have you ever seen Ray's railroad check?

A. Yes sir.

Q. When he worked for the railroad he always got paid by check to your knowledge?

A. Not always.

Q. Not always. Do you remember of any time when he [fol. 255] worked for the railroad that he didn't get paid by check?

A. That Saturday when he got hurt.

Q. That is the only time?

A. I think there might have been a couple of times when they were working on these spur tracks.

Q. These private tracks on Saturday he would get paid in cash, otherwise he was paid by check?

A. That's right.

(That's all)

The Court: Come down.

STIPULATION OF COUNSEL RE CURRENT SALARY RATE AND LIFE EXPECTANCY OF PLAINTIFF

Mr. Faircloth: Your Honor, I believe we have a stipulation as to the track at Chiefland being used in Interstate Commerce.

The Court: Yes sir. Counsel for the respective parties have stipulated in my presence at the Pre-Trial Conference that this privately owned spur track was used in Interstate Commerce. And the record so shows and counsel may state that they agree with that stipulation. You agree with it Mr. Faircloth?

Mr. Faircloth: Yes sir.

The Court: And you do?

[fol. 256] Mr. Dell: I do.

The Court: All right.

Mr. Dell: Shall I state the stipulation in the record?

The Court: Yes sir.

Mr. Dell: It is stipulated by and between counsel for the Plaintiff and the Defendant that the current rate of pay for an apprentice foreman on the Atlantic Coastline Railroad is $1.792 cents per hour.

The Court: All right, sir.

Mr. Faircloth: Your Honor, at this time the plaintiff desires to read into the record the Mortality tables.

The Court: You may state it for the record. That is in conformity with the State Statute, is it?

Mr. Faircloth: This is from the United States Department [fol. 257] of Health and Educational Welfare and I have a certified certificate here that these are the latest figures on compilation.

The Court: Don't you have the State Statute here?

Mr. Dell: I would prefer that they be used.

The Court: I have always required they be used. You use those there, there isn't enough difference in them. You use those, you have got the State Statute and you read them.

Mr. Faircloth: The Mortality tables reveal that a person twenty-nine years of age would be expected to live 38.61 years.

The Court: Say that again and let me get it down.

Mr. Faircloth: 38.61 years is the life expectancy of a person twenty-nine years old.

The Court: All right.

Mr. Faircloth: Your Honor, the plaintiff rests.

The Court: The plaintiff rests. Call your witness Mr. [fol. 258] Dell.

Mr. Dell: May I have a conference with Court and counsel?

The Court: Right here?

Mr. Dell: Out of the presence of the jury, Your Honor please.

The Court: You want to make a motion?

Mr. Dell: Yes sir.

The Court: Members of the Jury we will be in recess for a few minutes. Counsel and the court reporter will come to my chambers.

CHAMBERS HEARING

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

The Court: All right, state your motion, Mr. Dell.

Mr. Dell: Comes now Defendant Atlantic Coastline Railroad and moves the Court to direct a verdict for the Defendant because the evidence submitted by Plaintiff herein [fol. 259] is legally insufficient to support a verdict for the Plaintiff, and in support of said Motion Defendant assigns the following:

1. Plaintiff has failed to establish by a preponderance of the evidence, that at the time and place of his alleged injury his work was in furtherance of, or in any way directly or closely and substantially affecting interstate commerce.

2. Plaintiff has failed to establish by a preponderance of the evidence that at the time and place of his alleged injury, he was in the employment of Defendant Railroad.

3. Plaintiff Ward has failed to prove by a preponderance of the evidence that Defendant Railroad was guilty of any negligence which proximately caused the alleged injury and damages resulting therefrom.

4. It affirmatively appears from a preponderance of the evidence submitted by Plaintiff Ward that the sole proximate cause of his alleged injury, if resulting from any negligence, was the result of the negligence of Plaintiff Ward and not by reason of any negligence chargeable to Defendant Railroad.

And Defendant further moves the Court to direct a verdict for Defendant on each of the several counts of negligence as alleged and set forth in Plaintiff's Complaint [fol. 260] herein upon the grounds that the evidence submitted by Plaintiff herein is legally insufficient to show any negligence chargeable to Defendant Railroad under any of the following said counts:

a. That the tie hook with which Plaintiff was working was in any way unsafe;

b. That the method by which Plaintiff was removing and replacing cross-ties was not the method customarily used in the railroad industry, or was in any way unsafe under the circumstances;

c. That the place where the Plaintiff was working was in any way unsafe or that any conditions existed thereat for which Defendant Railroad was responsible which proximately caused Plaintiff's alleged injuries;

d. That the work which Plaintiff was performing was more than one man could reasonably be expected to do safely under the circumstances, or that Plaintiff had requested additional assistance which was refused prior to the injury;

e. That Plaintiff's alleged injury in any way resulted from any failure of Defendant Railroad to properly instruct Plaintiff as to a safe method for the removal and replacement of cross-ties under the circumstances;

[fol. 261] f. That defendant Railroad failed to furnish Plaintiff transportation to his home after his alleged injury where it does not appear that such transportation was requested nor was it reasonably apparent that transportation was then necessary to prevent further injury to Plaintiff Ward.

And Defendant Railroad further moves the Court to direct a verdict for Defendant on the issue of gross negligence apparently sought to be alleged under paragraph 4 (f) of Plaintiff's Complaint herein upon the grounds that there is no evidence to support a verdict against Defendant upon the issue of gross negligence.

The Court: That motion is denied.

Whereupon Court reconvened and the following proceedings were had:

The Court: Call your witness, Mr. Dell.

DEFENDANT'S CASE

MR. J. L. KENNEDY was first witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. Will you please state your name?

[fol. 262] A. J. L. Kennedy.

Q. And your occupation?

A. Superintendent of the Ocala District for the Atlantic Coastline Railroad.

Q. How long have you been Superintendent of the Ocala district?

A. Since June 15, 1948.

Q. Is Chiefland and Hardee Town in your territory?

A. They are.

Q. Are you familiar with the sidetrack at Hardee Town known as the McKenzie or M & M Turpentine Company track as it existed in May of 1954?

A. I am.

Q. Who paid for that track to be built?

A. Mr. McKenzie. Mr. D. P. McKenzie.

Q. Do you remember when that track was built?

A. Application was initiated in 1945, the track was actually constructed in 1946, March of that year, 500 foot of private track and 150 foot of Coastline track for which Mr. McKenzie paid $517.00 for the metal material on the 500 foot of private track. Immediately after he got that done he decided he wanted to extend it 850 feet more and that application was granted and he paid $716.12 for 1700 [fol. 263] foot of rail to build 850 foot of track.

Q. Who owns that track?

A. M & M Turpentine Company, of which Mr. McKenzie was president.

Q. Do you know who owns the land?

A. Yes sir. Mr. D. P. McKenzie's estate. Mr. McKenzie has passed away.

Q. What was the responsibility of the Atlantic Coastline Railroad with regard to the track in May of 1954?

A. The only responsibility that we had was for the section foreman to inspect it at regular intervals to see that it was in proper condition for use.

Q. What was the responsibility of the M & M Turpentine Company with regard to that track in May of 1954?

A. Repair the track to the satisfaction of the Chief Engineer of the Atlantic Coastline Railroad.

Q. What, if you know, was the policy of the Railroad in May of 1954 regarding the use of its tools by section foremen in making repairs to private tracks, such as this M & M Turpentine track on off-duty hours?

A. Made no objection to the section foreman using the tools to repair the track. We wanted to be as helpful as we could to them.

[fol. 264] Q. Was it necessary for the section foreman to first get permission from anyone in the company to use its tools for that purpose?

A. No sir.

Q. In May of 1954 what the normal work week for the section crew?

A. Five days a week, Monday through Friday, forty hours.

Q. What was their status after they finished forty hours on Friday?

A. They were free to go wherever they wanted to, just so they were back to work on Monday morning at work time.

Q. Mr. Clerk may I have Plaintiff's Exhibit 1 in evidence. Mr. Kennedy I hand you Plaintiff's Exhibit I in evidence, Rules of the Operating Department of the Atlantic Coastline Railroad Company, and I direct your attention specifically to rule 1046, which has been introduced into evidence by the plaintiff, in regard to the maintenance of tracks; and ask you, sir, if that rule obligates the Atlantic Coastline Railroad Company, or any of its employees, to make any repairs on private tracks?

Mr. Faircloth: You Honor, please. I object to the [fol. 265] question because it calls for an interpretation by the witness.

The Court: The rule speaks for itself. You can ask him the question as to whether or not they have any such obligation to maintain the tracks. You are interpreting the rule as what?

Mr. Dell: I am interpreting the rule as not being applicable to a private track.

The Court: Well, you can ask him that question.

Mr. Dell Continuing:

Q. Is that particular rule applicable to a private track such as the M & M Turpentine Company track insofar as the duty to maintain it is concerned?

A. It only requires proper inspection for safety of track including those privately owned.

Q. The only duty under that rule is for them to inspect it?

A. Yes.

(Your witness)

The Court:

Q. Any questions?

Mr. Faircloth: Yes sir.

[fol. 266] Cross-examination.

By Mr. Faircloth:

Q. Mr. Kennedy, the way I read this thing, it says: "and are responsible for the proper inspection and safety of tracks, bridges and trestles (including those privately owned)"?

A. You and I just read the rule differently.

Q. You read it, you read that thing and tell me if I read it wrong?

A. "They will have charge of maintenance of their assigned sections, and are responsible for the proper inspection and safety of tracks, bridges, and trestles (including those privately owned)".

Q. Thank you. Mr. Kennedy were Atlantic Coastline Railroad employees ever, to your knowledge, required to work overtime?

A. Yes sir.

Q. When they worked overtime they were paid on the basis of their regular rate plus one half of that, weren't they?

A. That's right.

Q. And is it your understanding that is what these fellows were getting out there that day that Ray Ward got hurt?

A. I heard they were.

[fol. 267] Q. Now, the Coastline owned part of this track didn't it?

A. What they call the "turn-out". No portion of the track that the Coastline owned can cars be placed on for loading, except at the clearance point. That means that no car can be placed on that part of the track below without fouling up the other track.

Q. That's right and that was the reason for not loading cars there either, pull them out further so they wouldn't foul another track. The Coastline pulled cars off of that siding, didn't it?

A. Yes sir.

Q. And got paid for it, didn't it?

A. Yes sir.

Q. This man, you say, who paid for the maintenance of this track out there, was a Coastline customer wasn't he?

A. Yes sir.

Q. And he paid the Coastline freight for the cars you hauled off there, didn't he?

A. Whoever shipped the car or the receiver of the car paid.

Q. He was a customer of the Coastline wasn't he?

[fol. 268] A. That's right.

Q. And you wouldn't send your cars out there unless the track was safe, would you?

A. No sir.

Q. And that is the reason for this rule making your section crew responsible for the safety and inspection of the tracks, including those privately owned?

A. Making them responsible for the inspection of the tracks and see they were safe.

Q. And not let your trains go on there until he said it was safe?

A. That's correct.

(That's all)

Redirect examination.

By Mr. Dell:

Q. Mr. Kennedy was the clearance point on this track, this M & M track, inside or outside of the Coastline right-of-way?

A. On the Coastline right-of-way.

(That's all)

Mr. Faircloth:

Q. Just one more question. Mr. Kennedy who furnished the rails out there?

A. The Coastline sold them to Mr. D. P. McKenzie of the M & M Turpentine Company at those prices I [fol. 269] quoted is what he paid for them.

Q. I believe that was $517.00?

A. For the first five hundred feet and $716.22 for eight hundred feet additional track.

Q. That applied to the angle iron pipes?

A. Metal materials.

Q. And the ties?

A. They were furnished by Mr. McKenzie.

Q. Did the railroad own any part of that stuff?

A. Not after they sold it to him.

Q. They made him pay for it, did they?

A. Yes sir.

(That's all)

The Court: Come down. Call your next witness.

MR. F. E. SANDERS was next witness called in behalf of defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. Please state your name?

A. Sir.

Q. I am standing back here on purpose Mr. Sanders because I know you are a little hard of hearing. I [fol. 270] want you to speak up. Will you please state your name?

A. Frank E. Sanders.

Q. Are you roadmaster for the Atlantic Coastline Railroad Company?

A. Yes sir.

Q. Where do you live?

A. I went to Perry in 1941.

Q. You went on in Perry in 1941?

A. Yes sir.

Q. Still live at Perry?

A. Yes sir.

Q. In 1954 were you roadmaster for the Chiefland section?

A. Yes sir.

Q. Was foreman Keene working under you during that period?

A. Yes sir.

Q. Do you know where the M & M or McKenzie Turpentine Company side-track is there?

A. Yes sir.

Q. Now, in May of 1954, did you know that Mr. Keene and the members of his crew were going to make any [fol. 271] repairs at the M & M Turpentine Company track?

A. I did but I didn't know what day they were going to make them.

Q. Did you instruct Mr. Keene to make the repairs on that track?

A. No sir.

Q. Do you know Ray Ward?

A. Yes sir.

Q. Was he a member of Mr. Keene's crew in May of 1954?

A. Yes sir.

Q. Did you have an occasion to see him the following month, in June of 1954?

A. Well, I can't exactly say how often I would see him because he didn't make regular time. Some of the times I would be over there he would be off that day.

Q. Do you recall whether or not you had an occasion to go down to Mr. Ward's house in 1954?

A. Yes sir. Not to his house. I saw him on the railroad. He came out to my motor car.

Q. What did you go down there to see him about?

A. I went to see him to ask him why he was laying off so much.

Q. What did he say?

[fol. 272] A. He told me that his wife was sick and he didn't have anybody to help her. And in the meantime he told me that he hurt his back sliding into base playing baseball two or three years ago.

Q. Did he say anything to you about having been hurt on the railroad?

A. No sir, he never has.

Q. Are you familiar with the rules of the railroad regarding reports of injury?

A. Yes sir.

Q. Do they require you to put one in?

A. Yes sir.

Q. Did you put one in on Ray Ward?

A. No sir.

Q. Why didn't you?

A. Because he was not injured on my job.

(Your witness)

Mr. Faircloth: No questions.

The Court: Come down. Come down, sir.

Mr. Dell: May he be excused, he wants to get back to [fol. 273] Perry.

The Court: Yes sir, go ahead.

MR. J. W. GREEN was the next witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. Will you state your name, please?
A. J. W. Green.
Q. You are an apprentice foreman for the Atlantic Coastline Railroad?
A. Yes sir.
Q. Were you working for the Atlantic Coastline Railroad in July of 1954?
A. Yes sir.
Q. Where were you working at that time?
A. Otter Creek.
Q. Was Mr. Ray Ward, the plaintiff in this case, working on your crew at that time?
A. Yes sir.
Q. Do you recall a day in July of 1954 when Mr. Keene, the section foreman, at Chiefland, brought his crew down to work with your crew near Herschel, Florida?
A. Yes sir.
[fol. 274] Q. Was Mr. Ward working on your crew that day?
A. Yes sir.
Q. Did you hear a conversation that took place between Mr. Ward and Mr. Keene on that day?
A. Yes sir.
Q. Who was present at the time that conversation took place?
A. Mr. Ward, Mr. Keene and myself.
Q. What conversation took place between Mr. Ward and Mr. Keene at that time and place?
A. Well, me and Mr. Keene both being section foremen at that time, and Mr. Ward had been to the bushes and Mr. Keene and I were standing right on the railroad crossing; and so, Mr. Keene came up to me and said "what are you letting that boy stay out in the bushes so much"?
Q. Just tell us the conversation that took place in Mr. Ward's presence, not anything else?
A. That is exactly what took place.

Q. Was Mr. Ward present at that time?
A. At that time, yes sir.
Q. All right, go right ahead?
A. And he said that his back hurt him.
Q. Who said his back hurt him?
[fol. 275] A. Mr. Ward said his back hurt him. Mr. Keene then said to him, "what's the trouble with your back"? He said, "I slid in on a baseball diamond playing ball at Gulf Hammock, Florida, and hurt my back." Then he said, Mr. Keene says to him, "you didn't hurt your back on the railroad then, did you?" He said, "no, but I wished I had."

(Your witness)

Mr. Faircloth: No questions.
The Court: Come down.
Mr. Dell: Mr. Green would you like to go on back to Gulf Hammock or Otter Creek, wherever it is you live?
Mr. Green: Not right now.
Mr. Dell: Call Mr. F. L. Richardson.

Mr. F. L. Richardson was next witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. What is your name, please?
A. Frank Richardson.
[fol. 276] Q. Frank, do you work on the section crew under Mr. Keene at Chiefland for the Atlantic Coastline Railroad?
A. Yes sir.
Q. Were you working with him and his crew in the month of May, 1954?
A. Yes sir.
Q. How long have you been on the crew, Frank?
A. About sixteen years.
Q. About sixteen years?
A. Yes sir.
Q. Is it a part of your duties to put in cross-ties?

A. Yes sir.

Q. Did you work on the M & M Turpentine Company's sidetrack at Hardee Town on the 22nd day of May, 1954, putting in some ties?

A. Yes sir.

Q. How did you get up to the job that morning?

A. In my truck.

Q. Where did you first meet the others?

A. Down at the tool house.

Q. At the tool house?

A. Yes sir.

[fol. 277] Q. How did you know what time to go to the tool house?

A. Well, that Friday afternoon after we made five days we all decided to meet there at 7:00 o'clock at the tool house.

Q. Decided to meet there the next morning?

A. Yes sir.

Q. Who had told you about the opportunity of meeting there the next morning?

A. The boss man.

Q. Who is the boss man?

A. Mr. Keene.

Q. Mr. Keene. What did he say to you Friday afternoon, if anything, that you remember?

A. He asked all of us if we wanted to make some extra time and extra money and we did and we all agreed to work on this private track.

Q. Did you know it was a private track?

A. Yes sir.

Q. How did you know that it was?

A. The boss man told me it was.

Q. Had you ever worked up there before?

A. Yes sir.

Q. Well now, you went back in your truck to the tool house [fol. 278] the next morning?

A. Yes sir.

Q. How did you get the tools?

A. The boss man came and unlocked the door and we put them on the truck.

Q. Did the others ride up there on the truck with you?

A. Yes sir.

Q. Do you remember about what time you got to the job?

A. Possibly about 7:30.

Q. About 7:30. Do you remember whether or not Mr. Ray Ward was working with you that morning?

A. Yes sir.

Q. Was he at the tool house the Friday afternoon before when Mr. Keene said about you all going up there?

A. Yes sir.

Q. What kind of work were you doing up at the M & M track?

A. Putting in cross-ties.

Q. Were the ties already there when you got there?

A. Yes sir.

[fol. 279] Q. You were using regular tools that you used in your work for the railroad?

A. Yes sir.

Q. You have seen Mr. Ward working in your crew—he was a regular member of your crew—you have seen him working before?

A. Yes sir.

Q. He had put in ties before?

A. Yes sir.

Q. Now, when you got out there that morning on the M & M Turpentine Company track, Frank, were you working anywhere near where Mr. Ray Ward was working?

A. I was close to him.

Q. Do you remember about how far you were working away from him?

A. Possibly the distance of that desk.

The Court: Was there anybody between you—any body working between you two?

A. I disremember.

Mr. Dell Continuing:

Q. You estimate the distance over to that desk, about twelve to fifteen feet?

A. About that.

[fol. 280] Q. Was he working between you and the main line track of the railroad or were you between him and the main line of the railroad? Do you remember?

A. I disremember.

Q. You don't remember?

A. No sir.

Q. Frank, do you remember how long you worked that morning out there?

A. About three hours.

Q. About three hours. Do you remember how you got paid?

A. Yes sir.

Q. How did you get paid?

A. Mr. Keene paid us.

Q. Did he pay you with a check or cash?

A. Cash.

Q. Where were you when you got paid?

A. At the tool house.

Q. Do you recall about what time it was when you got back to the tool house? Was it before noon or afternoon?

A. I disremember.

Q. You don't remember. Do you remember anything about Mr. Ward being hurt out there that Saturday morning?

[fol. 281] A. Yes sir.

Q. What do you remember about that?

A. Mr. Ward was putting in ties and I was putting in ties and I was standing there and he was standing there with his hands on his hips.

Q. Right where he had been working?

A. Yes sir.

Q. What did he do then?

A. I asked him what was the matter and he said he hurt his back.

Q. What did he do after that?

A. He walked off.

Q. He walked off the job?

A. Yes sir.

Q. Did you see him talk to anybody before he left that job?

A. No sir.

Q. Which way did he walk?

A. Toward Chiefland, south.

Q. Where you all were working at was north of Chiefland?

A. That's right.

Q. And he walked off the job and walked south down to Chiefland. How far was it down to Chiefland or is Hardee [fol. 282] Town a part of Chiefland?

A. I don't recall how far it is.

Q. Frank, I have forgotten it, but you told me you had been working on the section crew for twenty years?

A. Sixteen years.

Q. Sixteen years. Had you ever had any instructions, did anybody show you how to handle a tie when you were putting it under a track?

A. Yes sir.

Q. Did you use a tie-hook?

A. Yes sir.

Q. Do you back up to the track and get the tie in front of you like that (indicating) and then pull it to you?

A. That's right.

Q. Do you snatch it?

A. No sir.

Q. Have you ever been told to snatch it?

A. No sir.

Q. Have you ever tried to put one in by facing the track?

A. No sir.

Q. Well, have you ever seen anyone try to put one in that way?

[fol. 283] A. No sir, I never have seen anyone try it.

Q. Did it ever occur to you to try to face the track and put in a tie with the tie-hook?

A. It would strain me.

Q. You think it would be worse than the other way?

A. Yes sir.

Q. Didn't anybody ever tell you not to put it in by putting your back to the track?

A. No sir.

Q. Did anybody ever tell you not to put a tie in that way?

A. No sir.

Q. Have you seen other people put ties in up and down the railroad during the last sixteen years?

A. Yes sir.

Q. You never have seen anybody else put in a tie on the railroad in the sixteen years you have been working there?

A. I have seen them put them in but not facing, put them in the other way.

Q. You back up to it?

A. Always back up to it.

(Your witness)

The Court: Let me ask him a question before you do.

[fol. 284] When you are putting in ties like you were that morning, do you work in one or two?

A. One.

The Court: One. Is that the way you work all the time?

A. Yes sir.

The Court: On a regular cross-tie one man handles the cross-tie by himself?

A. Yes sir.

The Court: Is that true all the time?

A. Yes sir.

The Court: You may inquire.

Cross-examination.

By Mr. Faircloth:

Q. Frank, did Ray say anything when he got hurt that morning to you?

A. I asked him what was the matter and he told me that he had hurt his back.

Q. And you were working pretty close to him but you don't remember whether there was anybody between you and him or not, do you?

[fol. 285] A. No sir.

Q. Do you remember Jesse McBride?

A. Yes sir.

Q. Was he there?

A. Yes sir, he was there working.

Q. Did he say anything if you remember?

A. I don't remember.

Q. Now, where was Mr. Keene when this happened, do you remember?

A. He was off up the track sounding ties.

Q. Sounding ties. Which direction was he, toward the main line track or was he further down on the McKenzie track, if you recall?

A. He was further down the McKenzie track.
Q. Did you see him down there at the time?
A. I seen him went that way.
Q. Now, you didn't keep your eyes on him all the time but you remember seeing him at the time Ray told you that he got hurt—Mr. Keene?
A. No sir.
Q. You didn't. You say that Ray walked off. Did he walk off in the direction that you say you saw Mr. Keene walking?
A. No sir.
[fol. 286] Q. Did he walk the opposite way?
A. Yes.

The Court: You answer out loud so the young lady can get your answer down in the book.

Mr. Faircloth Continuing:

Q. Did you keep your eyes on Ray until he got out of sight?
A. No sir, I didn't.
Q. You went back to work?
A. Yes sir.
Well now, about how far did you look at him as he was leaving?
A. I don't recall. I was busy at work.
Q. You turned back and started to work?
A. Yes sir.
Q. You don't know who he talked to, do you?
A. No sir, I don't.
Q. Frank, was Ray Ward present on the Friday afternoon before this Saturday when the boss man said he wanted you all to work on Saturday?
A. Yes sir.
Q. Ray was there?
A. Yes sir.
[fol. 287] Q. And he told you that he wanted you to work on the McKenzie siding on Saturday, is that right?
A. Yes sir.
Q. Now, who did you think you were working for that day, on Saturday?
A. Mr. Mack McKenzie.

Q. Why do you say that?

A. Well, it was a private track—it was his track.

Q. Well now, who told you that?

A. The boss man, Mr. Keene.

Q. He told you, that is the reason you were working for Mr. McKenzie?

A. No sir, I was working to make some extra money.

Q. You were working to make that overtime?

A. Yes sir.

Q. You were paid overtime, weren't you?

A. Yes sir.

Q. You were doing the same things that you had been doing all the week, or the previous week, putting in cross-ties?

The Court: Mr. Faircloth, why are you asking him all of [fol. 288] those questions?

Mr. Faircloth: It is already established, Your Honor.

The Court: Sure, but why are you taking this time imposing on the jury and me. If it was something we needed, it would be different. That is something that has been gone over so many times already. It has been stated and proven by evidence that they got time and a half and they used the railroad's tools on that private track.

Mr. Faircloth: Just one final question.

Q. Did you ever hear anything about working for Perry Fugate out there that day?

A. No sir.

Q. Nobody ever told you that you were working for Perry Fugate?

A. No sir.

(That's all.)

The Court: Come down. Call your next witness.

[fol. 289] Mr. Dell: Hio Thompson.

HIO THOMPSON was next witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. Will you tell me what your name is?
A. Hio Thompson. H I O Thompson.
Q. Are you a section hand for the Atlantic Coast Line Railroad?
A. Yes sir.
Q. Working for Mr. Keene's crew at Chiefland?
A. Yes sir.
Q. How long have you been working down there?
A. Soon be six years.
Q. Were you working there during the month of May, 1954?
A. Yes sir.
Q. What were your duties, Hio?
A. My duty was, the boys put in cross-ties, clamps, pulled grass—first one thing and another, whatever there was to do.
Q. Now, do you remember working on the M & M Tur-
[fol. 290] pentine Company track on the 22nd of May, 1954?
A. Yes sir.
Q. What day of the week was it?
A. It was Saturday.
Q. You had finished working five days for the railroad?
A. Finished working five days for the Railroad and worked for the M & M Company that Saturday.
Q. How did you get paid for your work by the railroad?
A. Got paid by Mr. M & M check. He paid off the boss man with check and he went to the bank and got it cashed and he paid us off.
Q. I said how did you get paid when you worked for the Railroad?
A. Oh, in check.
Q. By check?
A. By check.
Q. How often did you get a check?
A. Twice a month.

Q. Did you ever get any money from the railroad in cash for working for the railroad?

A. No sir.

[fol. 291] Q. All right, how did you get paid for your days's work up there on the M & M track that Saturday?

A. I got it in cash.

Q. How was it that you knew what time to leave to go to work that morning?

A. We decided that Friday evening what time we would meet to go to work that Saturday morning, on the M & M track.

Q. Did you normally work on Saturdays?

A. No sir.

Q. For the railroad?

A. No sir.

Q. That was your day off?

A. Day off.

Q. Did anybody tell that you had to go to work for the M & M?

A. No sir.

Q. Why did you go?

A. Because I wanted to make some extra money.

Q. Make some extra money?

A. Make some extra money.

Q. How much money did it pay, the same money for overtime rates?

A. Yes sir.

[fol. 292] Was Mr. Ray Ward in your crew there at the tool house Friday night?

A. When we knocked off, yes sir.

Q. Did he come up there the next morning, Saturday?

A. Yes sir.

Q. Do you happen to remember how he came up there?

A. He and Jennings come in a little pick-up truck.

Q. He and Jennings?

A. He generally comes in a little pick-up truck.

Q. Oh, he generally comes in a little pick-up truck?

A. Yes sir.

Q. Well, do you know how he got from the tool house up to the M & M track?

A. If I make no mistake, he went in the little pick-up. He didn't go with us. I know that.

Q. How did you go?
A. I went in Frank Richardson's truck.
Q. Who carried the tools up there?
A. It also went in Frank Richardson's truck. One [fol. 293] of the hands truck.
Q. The same tools that you use all the time?
A. The same we use all the time.
Q. Did you work up there on that track differently than you did on the regular railroad?
A. No sir, the same way.
Q. Do you know where Mr. Ward was working that morning?
A. Working on the M & M track along with the rest of us.
Q. Was he working anywhere near where you were working?
A. Well, he was a little off from me.
Q. He was off from you?
A. Yes sir.
Q. Do you remember anything about him getting hurt on that track that morning?
A. Well, I remember someone telling me that he got hurt.
Q. Do you have any knowledge of it yourself?
A. No sir. No sir, I do not.
Q. Did he stay there until the job was over?
A. No sir.
[fol. 294] Q. What did he do?
A. We walked off. He went on back to town, I suppose, or to the house or somewhere.
Q. How long did it take you all on that job that morning, Hio?
A. Not long.
Q. Not long?
A. No sir.
Q. How long is not long?
A. Well, I suppose he was there about, right at about two hours, I imagine.
Q. What time did you get to the job?
A. What time did we get through with the job?
Q. Well, what time did you get through with the job?
A. Around about 10:30 or 11:00 o'clock.
Q. What did you do when you got through?

A. Picked our tools up, loaded them on the truck, and carried them back to the tool house.

Q. Did you see Mr. Ward talking to anybody before he left the job?

A. No sir, I didn't.

Q. Did you see him when he laid down his tools?

[fol. 295] A. Well, no sir. When I seen him he was walking away.

Q. He was walking away?

A. Yes sir.

Q. Now, at that time, do you recall where Mr. Keene was?

A. He was down the track a little piece.

Q. Down the track, which way, toward the main line or toward the tail end of it?

A. Well, he was between the road and the right-of-way. Between the road and the main line right-of-way.

Q. You are thinking about the little road crossing the track?

A. Yes sir, between the little road crossing off from the dog pen.

Q. Where did you get paid?

A. I got paid at the tool house.

Q. Who brought the money to you?

A. Mr. Keene.

Q. What form was the money in?

A. Cash.

Q. Cash money?

A. Yes sir, cash money.

Q. Hio when you went to work for the railroad [fol. 296] did anybody show you how to put in a tie?

A. Yes sir, the boss man worked with me for about two weeks.

Q. The boss man worked with you?

A. Yes sir, boss man worked with me. He had a shovel and I had one. I had a pick and he had one.

Q. One thing I forgot to ask you—these tools, they were the regular tools you used on the job that you used this Saturday?

A. Yes sir.

Q. Were they all in good shape?

A. In good shape, first class shape.

Q. Do I understand correctly that you get straddle of a tie after you have already dug a bed under the track for the tie to go in and you back up to the track and stoop down like this (indicating)——

A. And you pull it back under.

Q. And you pull the tie back under?

A. Between your legs and pull it back under between your legs and the ground.

Q. Did they ever tell you to be sure and snatch it?

A. No sir, he never told me that.

Q. Never did?

[fol. 297] A. No sir.

Q. Have you ever tried to snatch one under there?

A. Yes sir, but when you snatch it it will hit that rail and then it would be bad that way.

Q. Be bad?

A. Yes sir.

Q. Did they tell you not to snatch it?

A. Well, they tell us to work safely way.

Q. Have you ever tried putting a cross-tie in facing the rail?

A. I have tried it every way.

Q. How did it work?

A. That's bad.

Q. What is bad about it, Hio?

A. You just can't do it.

Q. What happens?

A. It just gets off balance.

Q. It don't feel right?

A. No sir, just off balance.

Q. And you usually had two or three fellows helping you with those ties, didn't you?

A. No sir, just one. My, myself.

Q. All the time just one man?

[fol. 298] A. All the time, just one man.

(Your witness)

The Court: Any questions, Mr. Faircloth?

Cross-examination.

By Mr. Faircloth:

Q. Hio you said that you saw Ray Ward walking away from the job. Did he act like he was hurt?

A. He had his hands on his sides.

Q. All right, and you told us that Mr. Keene was down near the main line track, the Coastline main line right-of-way?

A. Pretty close.

Q. Hio did you ever get any safety instructions from Mr. Keene?

A. Yes sir, from the boss.

Q. What kind of instructions did you get from Mr. Keene?

A. Well, he tell us on the job "boys work safely, don't get hurt, be particular and be careful."

Q. Did he tell you that on that date out there?

A. Yes sir, he tell us on the McKenzie job, especially.

Q. Why did he tell you that especially on the McKenzie job?

[fol. 299] A. Well, because we were not working for the Coastline.

Q. He told you that?

A. Yes sir.

Q. That morning?

A. He said "you are not working for the Coastline now and you want to be sure that you don't get hurt."

(That's all)

The Court: Come down.

Mr. Dell: Hio get back on the stand. I want to ask you one more question.

Redirect examination.

By Mr. Dell:

Q. You said that your best recollection was that Mr. Ward came up to the job to the tool house in a pick-up truck and went from the tool house to the job in the pick-up. Was he driving the pick-up or was someone driving him?

A. No, I think his wife was driving it.

Q. You think his wife was driving it?
A. Yes sir.

(That's all)

Recross-examination.

By Mr. Faircloth:

Q. How much does a cross-tie weigh? Do you have any [fol. 300] idea?
A. Well, some of them weigh less than a hundred pounds and some of them weigh right around a hundred and ninety and some weigh two hundred.
Q. How much do you weigh Hio?
A. A hundred and eighty-five.

(That's all)

The Court: Come down. Call your next witness.

Mrs. Vivian Crawford was next witness called in behalf of the defendant and having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. Will you please state your name?
A. Vivian Crawford.
Q. Mrs. Crawford what is your occupation?
A. Secretary to the General Road Master, Waycross, Georgia, Atlantic Coastline Railroad.
Q. Were you secretary to the General Road Master in Waycross in March of 1955?
A. Yes, I was.
Q. Was his name W. H. Colson?
A. Yes.
Q. Did you have an occasion to see Ray Ward on that [fol. 301] date?
A. Yes, I did.
Q. Under what circumstances did you see Mr. Ward at that time, Mrs. Crawford?

A. Well, our office was called on to get a statement from Mr. Ward as to what happened to him. He claimed his back was hurt. So, I called the hospital and I told them I would like to see Mr. Ward and they told me that Mr. Ward was not a bed patient, he was up town, that he was not there then. I told them that I would appreciate it if they would get word to Mr. Ward that we would like to get him to come to our office and give us a statement.

Q. I hand you Plaintiff's Exhibit 2 in Evidence and ask you if that is your signature on this statement?

A. Yes, it is.

Q. Was that the statement about which you have just mentioned in your testimony?

A. Yes, it is.

Q. Who was present in your office at the time that Mr. Ward came in?

A. As I recall, I was alone. There was no one else, certainly no one connected with the office.

Q. What did you do at that time?

[fol. 302] A. Well, he introduced himself and asked me what was it all about that the Coastline wanted a statement from him, "that I ain't been hurt on the Coastline". And I said, "well, it is just routine. You are in our hospital and you say you are hurt and we just want you to tell us how you were hurt, when, and all about it."

Q. How did you go about taking his statement? Did you type it up or did you take it down, or what?

A. No, no, I took notes down.

Q. You took notes?

A. Because Mr. Ward had a little difficulty in remembering the names of the people he worked with, and to spell the names; and also, the dates. I told him to take his time and be sure that it was all correct because it was his statement and he would sign it. I didn't rush him at all.

Q. Well now, who gave you the information that went into that statement?

A. Mr. Ward here.

Q. Did you have any source?

A. None whatsoever, only a letter to please have Mr. Ward to make a statement.

Q. You didn't know anything about the circumstances surrounding it at all?

[fol. 303] A. I had no earthly way of knowing it, except what Mr. Ward told me.

Q. Now, after you took down the notes and he got the dates and the names straightened out, did you type up the statement then?

A. No, I first read it back to him, Mr. Ward. We took our time and went over the dates and that was all correct and I said if it was all correct I would type it, and went right around to my typewriter and Mr. Ward sat there and I typed this statement.

Q. Now, after you typed the statement, what did you do with it?

A. I then took it out of the typewriter and handed it to Mr. Ward to read.

Q. Did he read it?

A. He read it.

Q. Did he object to anything in the statement?

A. Nothing whatsoever.

Q. Was the statement changed at any time after you finished it the first time and handed it to Mr. Ward?

A. No, this is the only statement I typed, only statement given.

[fol. 304] Q. Did he refuse to sign the statement?

A. No, he did not. He seemed very anxious to get all this cleared up.

Q. Where was the statement signed?

A. In my office where I work.

Q. Are you sure?

A. I am positive.

Q. Mr. Colson's name appears on that statement as a witness, does it not?

A. Yes.

Q. Was he there during the time that Mr. Ward was there?

A. Mr. Colson came in just, as I recall, as I was finishing the typing of the statement.

Q. Did Mr. Colson dictate any part of the statement to you?

A. No, he had nothing whatsoever to do with the statement. This is Mr. Ward's statement.

Q. Were you present there in the office in the presence of Mr. Ward all the time that Mr. Colson was there?

A. I certainly was.

Q. Did you see Mr. Colson get mad at Mr. Ward?

A. No, Mr. Colson walked in and I told him, I said, [fol. 305] "Mr. Colson you are just in time, this is Mr. Ward. He has been over, he has given us this statement as to what happened when and where". And I said, "you are just in time to witness the signature."

Q. What was Mr. Ward's attitude during the time that he was giving it to you ?

A. Very pleasant.

Q. Did you give Mr. Ward a copy of the statement after it was finished and signed?

A. I did.

(Your witness)

Cross-examination.

By Mr. Faircloth:

Q. Mrs. Crawford, you say that Mr. Ward dictated this statement to you?

A. Why yes, he sat there and told me everything that you see in there and I took notes.

Q. This is his language in here, is that right?

A. Why yes, yes, more or less. I may, if he used a bad word in there, I may have corrected it.

Q. You may have corrected it?

A. Yes, which is not uncommon at all.

Q. And you got this name Perry Fugate from him?

[fol. 306] A. Certainly. I have never heard of the name before, until Mr. Ward, and had no way of knowing anything about it.

Q. Let me see now—on Saturday morning—may I just read a portion of it: "while not on duty with the Atlantic Coastline Railroad, about 9:15 A. M., May 22, 1954, I was engaged in assisting section foreman, I. H. Keene, in reconditioning a private track in Chiefland belonging to D. P. McKenzie Company, which company had advised a local farmer Mr. Perry Fugate who wished to use this track that if he reconditioned this track he could use it." Is all of that Ray Ward's language?

A. Why certainly. I had never heard of any of those companies in my life until Mr. Ray gave them to me, I mean Mr. Ward.

Q. Did you supply any words or anything in there that you might have stricken?

A. No, I didn't know anything about it. I couldn't supply anything.

Q. "It was for this reason, Mr. Keene, I and several colored laborers were hired by Mr. Fugate, on our time, on Saturday, May 22, 1954, to recondition this track for him. At about 9:00 A. M., on this day I was engaged in [fol. 307] inserting a tie-hook when I felt something pop in the lower part of my back, which was very painful." All of that is his?

A. Yes, of course, it is.

Q. Now, down here the last sentence—"I do not know what this is all about as I have not at any time tried to construe to any one that I sustained a personal injury while on duty with the Atlantic Coastline Railroad". That's his language again?

A. Indeed it is. He said that and as a matter of fact, he said it several times. He became very perturbed several times for anyone to insinuate that he was hurt on the Atlantic Coastline Railroad.

Q. Did you understand the nature or kind of statement that you were to take from him when you asked him to come in there?

A. I was only to get his statement. What he had to say about it.

Q. Did you know where he had been hurt?

A. No, I did not.

Q. Did you know——

A. That is why I went that far, I knew nothing whatsoever about it.

Q. You said you were called upon to take a statement [fol. 308] from Mr. Ward?

A. Yes.

Q. And who called on you to do that?

A. We received a letter from the Jacksonville office stating that Raymond P. Ward was a patient in our hospital and they wanted—our office is in Waycross where the

hospital is. It is not uncommon for them to ask us to take down a man's statement because we are right there.

Q. Do you by any chance have that letter that you received from the Jacksonville office?

A. Oh——

The Court: Do you have it here with you?

A. Let me think a minute. I think I can produce it, if I must. I don't know.

The Court: Well, I mean if you have got it here, all right, but I am not going to send you to Waycross to get it.

Mr. Faircloth Continuing:

Q. Do you have it in town here, Mrs. Crawford?

A. Yes, I have it.

Q. Where is it?

A. I will go get it.

[fol. 309] The Court: Go get it, get it. It is about recess time so while she is looking for it, we will take a ten minutes recess.

After recess the following proceedings were had:

The Court: You may proceed, Mr. Faircloth.

Cross-examination.

By Mr. Faircloth:

Q. Mrs. Crawford did you find the letter?

A. Yes, I am sorry I told you that I had the letter I received from Jacksonville but I didn't bring it with me. I brought the letter that I wrote to Jacksonville after Mr. Ward gave me his statement. I, of course, sent the statement to Jacksonville and I have the letter that I wrote to Jacksonville and attached the statement to it, which the contents of it you can get about what the Jacksonville letter was. I only brought what I wrote with me. (Hands to Mr. Faircloth).

Q. Thank you. Mrs. Crawford this is the letter that you wrote to Jacksonville after you had taken the statement from him?

A. That's right. After taking a statement it is customary to send it to Jacksonville and I wrote that top letter you see and I attached the statement to it.

[fol. 310] Q. You wrote this letter?
A. Yes, I always write the letters.
Q. And Mr. Colson signs them?
A. Not routine letters.

The Court: Well, did he sign that one? Does it show he signed that one?

A. He witnessed Mr. Ward's signature.

Mr. Faircloth Continuing:

Q. No, did he sign the letter?
A. On the Coastline our letters that we write from official to another they are all signed by a typewriter like you see that one.
Q. Who signed the thing, Mr. Colson?
A. He witnessed Mr. Ward's signature.
Q. That letter which is directed to Mr. A. V. Hooks in Jacksonville, who signed it?
A. You see it is not signed. It is signed by the typewriter. All Coastline letters between officials are that way.
Q. The original was signed, wasn't it, when it went out of the office?
A. Well, if he is in there he may have put his mark on it.
[fol. 311]
Q. Who wrote the letter, you or Mr. Colson?
A. I write nearly all of the letters in our office.

The Court: Well, did you write that one?
A. Yes sir. That is what I am trying to tell you, I wrote this. Also, Mr. Ward dictated this statement to me, himself, and I wrote it and it was witnessed by me, and by Mr. Colson, because he happened to come in the office while this was going on.

Mr. Faircloth: Your Honor, the plaintiff would like to tender this in evidence.
The Court: You may file it for identification.

Marked for Identification Plaintiff's Exhibit No. 7

The Court: Let him go ahead Mr. Dell, you will have a chance to object when he tries to get it in evidence.
Mr. Dell: I was trying to save time. If he wants to put it in evidence I will put it in as my exhibit.

[fol. 312] The Court: All right then, you do it. Withdraw it as Plaintiff's exhibit for identification and defendant offer it in evidence.

Mr. Dell: Introduce it in evidence as Defendant's Exhibit No. 1.

RECEIVED IN EVIDENCE AND MARKED DEFENDANT'S EXHIBIT No. 1

The Court: All right, Mr. Faircloth, any further questions?

Mr. Faircloth: Yes sir, just a few.

Mr. Faircloth Continuing:

Q. Mrs. Crawford, the date of the statement which you say Mr. Ward signed, was March 2nd was it not?

A. Yes, I think that is right.

Q. The date of this letter is March 9th. So you wrote it a few days after Mr. Ward signed it?

A. Yes. That was the first time that I had time.

Q. Mrs. Crawford, let me ask you——

A. I probably held that until Mr. Colson came in to [fol. 313] okay it.

Q. I see. Do you customarily take statements from patients in your hospital up there?

A. Yes, I do.

Q. In the same manner that you did this one?

A. Yes.

Q. Did I understand that your testimony is that at the time this letter was written up Mr. Colson was not there?

A. Which letter?

Q. This one Ward signed?

A. No. Mr. Colson came in as I was finishing it. I remember distinctly.

Q. As you were finishing typing it up?

A. Yes. I said, "here is Mr. Ward's statement". Mr. Ward read it and then Mr. Colson read it. He turned to Mr. Ward and said, "Mr. Ward is this correct, is this your statement?" And he said "Yes sir". So we handed it to him and he signed it and Mr. Colson witnessed his signature and then I did. Then Mr. Colson left and Mr. Ward remained in the office for some little time after that. He is very talkative.

Q. Are you a notary?

A. No, I'm not.

[fol. 314] Q. Mrs. Crawford I want to ask you whether this happened or didn't happen. Isn't it true that Mr. Ward came to your office and waited until Mr. Colson came back?

A. No, because he had no reason to.

Q. Isn't it further true that he talked to you while he was waiting for Mr. Colson?

A. No. Mr. Ward, we didn't wait for any one—and that is why I take down statements that people give. They give them to me usually, all the time I take them.

Q. Go ahead. Have you finished?

A. That's right.

Q. Isn't it further true that when Mr. Colson came, you all went in to Mr. Colson's office——

A. No, we were in Mr. Colson's office all the time.

The Court: You let him finish his question and then you can say what you want to.

A. All right.

Mr. Faircloth Continuing:

Q. And you went in to Mr. Colson's office and that Colson is the man that dictated this statement?

A. No sir. We were in Mr. Colson's office all the time. We only had one office.

[fol. 315] The only thing is, Mr. Colson wasn't there?

A. That's right.

Q. According to your statement?

A. That's right. He travelled.

Q. But he wasn't travelling that day, was he?

A. Yes. He was out, outside in his car.

Q. You say he travels, he travels up town?

A. As a general rule that is his job to cover the road.

Q. But he was in town that day, wasn't he?

A. He came in that day as Mr. Ward and I finished. Mr. Ward had finished giving me his statement and I had typed it when Mr. Colson came in.

Q. Were you expecting Mr. Colson back in town that day?

A. Not any more no. I didn't need Mr. Colson to get Mr. Ward's statement.

Q. Did you know that he was in Waycross?
A. He was probably somewhere in the car.
Q. Now, Mrs. Crawford, you say that Ward did not refuse to sign it that day?
A. No sir, he did not.
[fol. 316] Q. I want to ask you whether or not it is a fact, that he did refuse to sign it and you later took it to him at the hospital?
A. I have never seen Mr. Ward in a hospital.
Q. Are you positive about that?
A. I am positive.
Q. Do you remember going out to the hospital that day and laying your coat on the foot of his bed?
A. No, indeed not.
Q. That did not happen?
A. It did not happen.
Q. And getting him to sign the statement in the hospital?
A. No, no that is not true.
Q. It did not happen?
A. No, it did not happen.

(I think that is all).

The Court: Any questions?
Mr. Dell: No, Your Honor.
The Court: Come down. All right, you want to offer this letter in evidence and read it?
Mr. Dell: Yes, I thought it was already in evidence, [fol. 317] Your Honor.
Mr. Faircloth: May I ask one more question, Your Honor?
The Court: Yes. Mrs. Crawford resume the stand.

Mr. Faircloth:

Q. Mrs. Crawford, why was it necessary to take a statement from Ward?
A. Well, the railroad wanted to know what happened to him. They didn't know anything about it.
Q. Well, had you heard that he was contending that he was working for the railroad?
A. What?
Q. Was he contending that he had been working for the railroad?

A. What do you mean?

Q. Why did you take a statement, why was it important to get a statement from him?

The Court: She has answered that already. Let's see if she can do it again on cross.

A. Because he was in our Atlantic Coastline Hospital.

[fol. 318] Q. Do you take statements from all of the patients in the hospital?

A. All that I am called on to take, yes.

Q. All you know is that you were called on to get his statement?

A. Yes, the railroad wanted to know why Mr. Ward was in the hospital claiming he had a hurt back and they knew nothing about it.

Q. This leter which came from Jacksonville asking you to take a statement didn't tell you why they wanted it, did they?

A. Well, they said to please contact Mr. Ward and get a statement from him as to the facts of what happened to him and that is what I did.

Q. And that is the letter you don't now have?

A. No, because I didn't write that letter. I just brought along with me what I wrote.

(That's all)

The Court: All right, you may come down.

Mr. W. H. Colson was next witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Dell:

Q. You have been sworn have you not, Mr. Colson?

[fol. 319] A. Yes sir.

Q. Will you please state your name?

A. W. H. Colson.

Q. What is your occupation, Mr. Colson?

A. General Road Master, Atlantic Coastline.

Q. Were you General Road Master of the Atlantic Coastline Railroad in the Waycross Division on March 2nd, 1955?

A. Yes sir.

Q. Was Mrs. Crawford your secretary at that time?

A. Yes sir.

Q. Did you see the plaintiff in this case, Mr. Ray Ward, on that date?

A. Yes sir.

Q. Where was he when you saw him?

A. In my office.

Q. Were you at your office when he came in?

A. No sir.

Q. What was he doing in your office when you arrived?

A. Well, he was sitting down in a chair near the desk and Mrs. Crawford had been taking a statement from him.

Q. I hand you Plaintiff's Exhibit No. 2 in evidence and ask you if your signature appears thereon as a [fol. 320] witness?

A. Yes sir.

Q. Is that the statement that Mrs. Crawford was taking from Mr. Ward at the time you came in the office?

A. Yes sir, this is it.

Q. Did he read that statement in your presence before he signed it?

A. Yes sir.

Q. Did he object to anything in it?

A. No sir.

Q. Did he refuse to sign it?

A. No sir.

Q. You are positive that the statement was signed in your office?

A. Yes sir.

Q. Could it possibly have been signed in the Waycross hospital?

A. No sir.

Q. Did he refuse to sign the statement?

A. No sir

Q. He signed it freely and voluntarily?

A. Yes sir.

Q. Did you have any conversation with him in which you got angry with him, display any temper toward him?

[fol. 321] A. No sir.

Q. Did you have any knowledge of the facts set forth in that statement before you read the statement there in your office?

A. No sir, I did not.

Q. Do you know whether or not Mr. Ward was given a copy of that statement?

A. I am sure that he was, yes sir.

Q. I hand you Defendant's Exhibit No. 1 in evidence that is a copy of a letter and ask you if you have any recollection of having seen that letter go out of your office?

A. Yes sir this letter—I wrote this letter.

Q. Did you sign the original of it?

A. We don't normally sign them.

Q. May I ask the witness to read the letter to the jury, Your Honor?

The Court: All right.

A. This is a Personal Injury, dated Waycross, Georgia, March 9th, 1955. Raymond P. Ward, Apprentice Foreman, Chiefland, Florida, May 22nd, 1954.

Mr. A. V. Hooks,
Engineer Maintenance, ACL

[fol. 322] Referring to your letter of February 28, 1955, addressed to Road Master F. D. Sanders, with copy to me, reference Raymond P. Ward, Apprentice Foreman, Chiefland, Florida, being admitted to the ACL hospital in Waycross on November 8th, 1954, as the result of an alleged back injury sustained in May. Mr. Ward who is still a patient in the ACL hospital in Waycross was contacted and I attach herewith statement which he gave reference injuries sustained by him. You will note Mr. Ward was not on duty with the Atlantic Coastline when he alleges this injury occurred, but instead was assisting in reconditioning of a private industry track at Chiefland, Florida, on his own time on May 22nd, 1954, which track is owned and maintained by the D. P. McKenzie Company, who had given permission to Mr. Perry Fugate to recondition this track for privilege of using same. And at about 9:15 A. M., on this date, while placing a tie with tie-hook he felt something pop in the lower part of his back, which was painful, and he

went to several doctors at his own expense before he was able to work again. And finally being a paid-up member of the ACL Relief Department he entered the ACL hospital in Waycross for treatment, where he is still undergoing same. You will note from this statement that he was not injured while on duty with the Atlantic Coastline Railroad and has not at any time tried to construe to any one that he was. You will note that he further advises that the [fol. 323] doctor at the hospital thinks he may never be able to perform his work again. Will you please advise what handling should be given if and when this man obtains a form 38 from Company doctor to return to work, as you know the duties of an apprentice foreman is similar to section laborer's work. Copy to our Claims Agent at that time Mr. H. H. Roland and Captain W. R. Butler, with copy of R. P. Ward's attached. And a copy to Mr. F. D. Sanders, Road Master, do not allow this man to return to service without first conferring with this office.

Mr. Dell: Thank you very much. Your witness.

Cross-examination.

By Mr. Faircloth:

Q. Do not allow this man to return to service without first conferring with this office. Did anybody confer with your office later about Ward, pertaining to Ward's returning to work?

A. No sir.

Q. Nobody did?

A. No sir.

Q. Did you know anything about a transfer he was seeking in to the transportation department?

A. No sir.

Q. Did you have anything to do with those things ordinarily?

[fol. 324] A. Well, ordinarily I do not. It is usually handled with the Road Master. If it is satisfactory with the Road Master, why, sometimes I don't know about it.

Q. Who would that be in this case?

A. Mr. Sanders.

Q. Over in Perry?

A. Yes sir.

Q. In other words, the transfer could have been effected without you knowing anything about it?

A. That's right.

Q. But you were the head man—you were in charge of Sanders, were you not?

A. Yes sir.

Q. You were Sander's boss?

A. Yes sir.

Q. Mr. Colson, where had you been that day? You said that you came into your office at the time this was taking place.

A. I don't recall exactly where I had been. I had been out some place.

Q. What time of the day was it?

A. As I recall, it was in the afternoon.

Q. About what time in the afternoon?

A. I couldn't say. It was approximately three or four [fol. 325] o'clock. I don't remember the exact time.

Q. It wasn't during the lunch hour but later in the afternoon?

A. My recollection it was, yes sir.

Q. Had you been in the office that day?

A. I had probably been in there that morning, early.

Q. Had you seen that letter from Hooks over in Jacksonville asking you to get a statement from Mr. Ward?

A. I believe I read it a day or two before that.

Q. Tell the jury what that letter said?

A. I haven't got the letter.

Q. Do you recall what was in it?

A. Not exactly, no sir.

Q. What was the gist of it?

A. Well, this man was in the hospital and he was alleged to have been injured and we were to investigate to determine what was wrong.

Q. Well now, alleged to have been injured while working for the railroad?

A. Well, we didn't know where he had been injured. At that time I didn't.

Q. Is that all you remember about that letter from [fol. 326] Hooks?

A. I remember that he—the letter was addressed to Mr.

Sanders as I recall, with a copy to me, and since Mr. Sanders was at Perry and I was at Waycross, I handled it.

Q. Because Ward was at Waycross?

A. According to his letter, yes sir.

Q. Well, did you authorize your secretary to call the hospital and have him come in?

A. Yes sir.

Q. You didn't call him yourself?

A. No sir, I didn't.

Q. Now, did I understand that you are telling us that you didn't personally interview Ward?

A. I did not.

Q. All you did was witness and put your name on this signed statement and sent it in?

A. I asked Mr. Ward if these were the facts and he said they were.

Q. Had you ever heard anything up to that time about Perry Fugate at Chiefland?

A. No sir, that is the first that I knew about Perry Fugate.

Q. All right, you never did ask Keene about who he was working for down there, did you?

[fol. 327] A. No sir.

Q. You never have?

A. I don't understand.

Q. About who they were working for on that Saturday when Ray got hurt?

A. No sir, I don't ever recall ever asking Mr. Keene who he was working for. This came to my attention when I got the letter from Mr. Hooks.

Q. Now, this letter from Hooks, did Hooks seem to be disturbed about the fact that this boy might have been hurt while he was working for the Coastline?

A. Well, he always wants an investigation quickly when anything happens. And if a man is working on the — and something happens we quickly investigate it.

Q. This was the first knowledge you had about it?

A. That's right.

Q. And you found out from this statement here that he said according to the statement you saw there, that he was not working for the railroad, and you hastened to advise Hooks at Jacksonville, didn't you?

A. I didn't understand the question.

Q. You advvised Hooks in Jacksonville what you had found out?

A. That's right.

[fol. 328] As a matter of fact, you just about copied the statement into this letter to Hooks, didn't you?

A. Well, I had the statement.

Q. Now, you mentioned in here in next to the last paragraph, the last sentence of that paragraph, "you will note he further advises that the doctor at the hospital thinks he may never be able to perform heavy work again". That is what you took from this statement?

A. That's right.

Q. Mr. Colson, you have thought this thing over a lot since this case came up, haven't you?

A. Well, I thought about it, yes sir.

Q. Tried to refresh your mind, your recollection, as to what happened?

A. Yes sir.

Q. Have you had any help in refreshing your mind and recollection in this matter?

A. No sir, just referring to the file.

Q. You referred to the file. Have you talked it over with Mrs. Crawford?

A. No sir.

Q. You haven't talked with her about it?

A. I have mentioned it, we have talked about it, yes sir.

[fol. 329] Did you remember the day you came in and signed this statement?

A. I do.

Q. You remembered it when it all came up here in this case?

A. Well, the first I knew about it I got a wire at Rocky Mount, and I began to think about it and it came to my mind about the case.

Q. You got a wire that the Coastline had been sued?

A. I got a wire from Mr. Dell.

Q. Prior to the time that you got the wire you hadn't refreshed your recollection or your mind about this thing at all?

A. Well, I always think about these injuries that occur

on the railroad or anywhere else. When I take these statements, of course, it is in my mind.

Q. Did you check with Mrs. Crawford at any time, say to her something to the effect, "what did happen there that day, or what went on"?

A. Repeat the question, please.

Q. Did you talk to Mrs. Crawford since this case came up about what happened there that day in your office?

[fol. 330] A. We have discussed it, yes sir.

Q. What did you discuss about it?

A. We just discussed the case.

Q. About Ward signing the statement?

A. We just discussed the whole case. We discussed the case and I remember what happened, sir.

Q. Did you tell Mrs. Crawford that you remembered it very distinctly?

A. I told her that I had a memory of it, yes sir.

Q. And she remembered it very distinctly?

A. Yes sir.

Q. That the signing was about to take place when you came in?

A. Yes sir, it was about to take place.

Q. Do you remember what she said to you when you came into the office?

A. I do not recall exactly. I couldn't say definitely.

Q. She asked you to witness the signature didn't she?

A. Well, I asked her what was going on and she told me.

[fol. 331] Q. Do you remember her saying anything like this: Well, you are just in time to witness this statement"?

A. I don't recall exactly what was said.

Q. But what you are clear on, Mr. Colson, is that this boy didn't refuse to sign that statement?

A. No sir.

Q. You are further clear that the boy didn't come into your office and you all discuss the thing generally before it was reduced to this statement, aren't you?

A. I don't recall discussing it prior to the statement.

Q. Do you think you would recall it if it happened?

A. I didn't do it. It wasn't discussed.

Q. You know that that didn't happen?

A. Yes sir.

Q. He did not sit in your office and you dictate this statement?

A. No sir.

Q. That is positively so?

A. That is positive.

Q. And he did not refuse to sign it there in your office that day?

A. No sir.

[fol. 332] Q. And he did not call you later from the hospital or your office and tell you that he had decided to sign the statement?

A. No sir.

Q. And you did not send your secretary, Mrs. Crawford, out to the hospital to get the thing signed at a later time?

A. No sir.

Q. That you are positive did not happen?

A. No sir, it did not.

Q. Mr. Colson, it was mighty important to you in replying to Hooks over in Jacksonville to establish that the boy was not working for the Coastline at the time he was injured, wasn't it?

A. Yes sir, I was proud to know that he was not working for the Coastline when he was injured.

Q. Beginning at paragraph two of this letter, you said: "you will note Mr. Ward was not on duty with the Coastline when he alleges this injury occurred". And then the first line of the next paragraph, you say: "You will note from his statement that he was not injured while on duty with the Atlantic Coastline Railroad."

The Court: He emphasized it about like you are.

Mr. Faircloth Continuing:

[fol. 333] Q. It seemed to be pretty important to you in that letter, didn't it?

A. Yes sir, it was important to me that he was not hurt while working for the Atlantic Coastline Railroad.

Q. And when you got that information you wanted to pass it on?

A. Yes sir. Yes sir, because he was anxious for the information.

Q. Do you know whether or not there had been any talk that the boy had been injured while working for the Coastline?

A. Not to me.

The Court: Mr. Faircloth, I have been too indulgent.

Mr. Faircloth: I appreciate that, Your Honor. This is an important point to me.

The Court: You have asked him that question and he has answered it twice before. I just don't think you can go around the other side of the house and ask the same question just because you are on the other side of the house.

Mr. Faircloth: Thank you, Your Honor. No further questions, Your Honor.

[fol. 334] Redirect examination.

By Mr. Dell:

Q. Mr. Colson you are familiar with the Rules of the Coastlane Railroad requiring that an immediate report be sent in in the event of an injury of a man in the course of his employment, are you not?

A. Yes sir.

Q. This man was working under Keene, who was under Sanders, and Sanders was under you?

A. That is right.

Q. And no accident or injury report before had been filed on him, had it?

A. No sir.

Q. And if he had been hurt while he was working on the Coastline time somebody would have been burned for it, wouldn't they?

A. Form 18, if he had been working on the Coastline, would have been filed immediately.

Q. Right. In the absence of the filing of Form 18, the man if he had been hurt on the Coastline time, either you or Sanders or somebody would have lost some skin, wouldn't you?

A. Yes sir.

Q. And that is why it was important to you?
A. Absolutely, sir.

(No further questions)

[fol. 335] Recross-examination.

By Mr. Faircloth:

Q. Mr. Colson, was Ray Ward supposed to report to you when he got hurt, if he got hurt on the Railroad?
A. He was supposed to report to his immediate superior, and that was Mr. Keene, and either he or Mr. Sanders was supposed to file Form 18.
Q. Mr. Keene in Chiefland was his immediate boss?
A. Yes sir.
Q. He is supposed to report to him, isn't he?
A. Yes sir.
Q. Now, what happens to Keene if Keene doesn't report one of these injuries? Is he burned?
A. If he is working on the Coastline Railroad and if he didn't report it, why he would be burned.
Q. And Keene knows he would be burned, doesn't he?
A. Yes sir.
Q. Because that is a rule of the railroad?
A. Yes sir.
Q. If a foreman doesn't report an injury and it turns up here four or five months later with an injury that happened [fols. 336-362] on the road and the foreman didn't report it, what would you do with the foreman?
A. Well, he would be scorched. They will report it because they don't want that scorching.
Q. That's right and they know they are going to be scorched, don't they?
A. If he is working on the railroad he is.

(Thank you, that's all).

The Court: Come down.

Mr. Dell: Your Honor, we will need about two minutes to get a shadow box up for X-rays.

The Court: All right.

* * * * * * *

[fol. 363] Mr. Dell: The defendant rests, Your Honor.
[fol. 364] The Court: The defendant rests. Do you have any rebuttal?

Mr. Faircloth: Your Honor, a short question or two of the plaintiff.

The Court: All right. Call him to the stand.

RAYMOND P. WARD resumed the witness stand, and testified as follows:

Direct examination.

By Mr. Faircloth:

Q. Ray, you heard Mrs. Crawford here this afternoon testify?

A. Yes sir.

Q. Did you go to her office and give her the statement as she indicated?

A. No sir.

Q. How did that happen?

The Court: Now, he has already testified to all of that. You just want to double it?

Mr. Faircloth: Your Honor, I don't want necessarily to double it, but I want to have it made clear.

[fol. 365] The Court: It is clear to me. I think it is clear to the jury. There is a complete conflict in the testimony of this witness and the testimony of those two Coastline employees as to what happened.

Mr. Faircloth: If that is the case, Your Honor, that is all.

The Court: Come down. I don't think you need to repeat it. If any of you jurors didn't understand it, please raise your hand and I will have him repeat it again. (No hands). That ought to satisfy you. You have no rebuttal?

Mr. Faircloth: That is all, Your Honor.

The Court: Now, I am going to meet counsel in my Chambers as soon as I recess. Members of the Jury when I recess you be back here at 9:30 tomorrow morning and we will listen to some good oratory and then I will submit the case to you as soon as I can.

[fol. 366] After both the plaintiff and the defendant rested, counsel for the respective parties were called into Judge DeVane's Chambers and the following proceedings were had:

Mr. Dell: Your Honor, I have a motion.

The Court: You may state it for the record.

Mr. Dell:

MOTION FOR DIRECTED VERDICT AT CONCLUSION OF ALL EVIDENCE AND DENIAL THEREOF

Comes now Defendant, Atlantic Coast Line Railroad, and moves the Court to direct a verdict for the Defendant because the evidence submitted herein is legally insufficient to support a verdict for Plaintiff, and in support of said Motion, Defendant assigns the following:

1. The manifest weight and probative force of the evidence clearly shows that at the time and place of his alleged injury, Plaintiff, Ward, was not in the employment of Defendant railroad, but rather had agreed to help make repairs to a private railroad siding which was owned by [fol. 367] a third party to whom he looked to be paid for his services, and who had the responsibility for making such repairs.

2. Plaintiff Ward has failed to prove by a preponderance of the evidence any of the charges of negligence against Defendant railroad.

3. The manifest weight and probative force of the evidence clearly shows that if there was any negligence, it was the negligence of Plaintiff, Raymond Ward, which was the sole proximate cause of his alleged injury, and not by reason of any negligence on the part of Defendant railroad, under any of the following charges:

a. Failure to furnish safe tools;

b. Failure to furnish safe place of work;

c. Failure to provide a safe method of work;

d. Failure to furnish sufficient help;

e. Failure to furnish proper instructions as to safe work methods;

f. Failure to furnish transportation after injury;

[fol. 368] g. Failure to furnish adequate treatment after undertaking such treatment.

4. The evidence submitted by Defendant herein, when considered in the light of the entire evidence of the case, is of such probative force that the Court, to give effect to the manifest weight of the evidence, and in justice in the case, might properly grant a new trial if verdict were to be rendered for Plaintiff Ward.

The Court: I deny both motions.

Will counsel for plaintiff and defendant stipulate in the record as to the ownership of the track?

Mr. Dell: Yes sir.

Mr. Faircloth: Yes sir.

STIPULATION OF COUNSEL AS TO OWNERSHIP OF RAILROAD TRACKS

Mr. Dell:

It Is Stipulated and Agreed by and between counsel for the plaintiff and the defendant that the alleged accident occurred on a private side-track owned by the M. & M. [fol. 369] Turpentine Company at Hardee Town; and that said private side-track was connected with the main line track of the Atlantic Coast Line Railroad Company.

REQUESTED CHARGES AND RULING THEREON

The Court: We will now take Plaintiff's Charges:

I will give Plaintiff's Requested Charge No. 1 as modified.

I am going to deny Plaintiff's Requested Charge No. 2 in the language as requested here. However, I am going to give a Charge of my own that presents the precise question you have requested in No. 2. I think the Requested Charge in the language you have it may be confusing to a jury.

Requested Charge No. 3 in the form that you have asked will not be given. Nevertheless, the heart and substance will be given by me.

Requested Charge No. 4 I will deny.

Requested Charge No. 5 is taken care of in the stipulation.

Requested Charge No. 6 is denied.

[fol. 370] Requested Charge No. 7 is denied.

Requested Charge No. 8 is not given as requested. It is already covered.

Requested Charge No. 9, while I am denying as requested here, I am giving my own Charge on Negligence and will include in that proximate cause you have in another Charge here.

Requested Charge No. 10 I will give.

Requested Charge No. 11 I am going to give over counsel's objection.

Requested Charge No. 12 I will give as amended.

Requested Charge No. 13 I will take this Charge you have requested (plaintiff) and the one you have requested (defendant) and consolidate into one Charge.

Requested Charge No. 14 I will give.

Requested Charge No. 15 I will give as amended.

Requested Charge No. 16 I am denying in the form which you have asked.

[fol. 371] Requested Charge No. 17 I am going to include in my Charge on Negligence.

Requested Charge No. 18 I am going to work in in connection with the expert's testimony, Dr. Wilcox.

Mr. Dell: Will the record please note an exception.

The Court: Requested Charge No. 19 I am giving.

Requested Charge No. 20 I will consolidate in substance with Requested Charge No. 19.

Requested Charge No. 21 I will give.

Requested Charge No. 22 I will give.

Requested Charge No. 23 is repetitions and for that reason I deny it.

Requested Charge No. 24—this is the law applicable to railroad companies and I will give it as amended. I will amend it and give it.

Requested Charge No. 25 I deny it, not because there is anything wrong with it, but I think I have a little better Charge on Weight of the Evidence, etc.

[fol. 372] We now pass to the Defendant's Charges:

Requested Charge No. 1 I am denying as requested but in substance it will be given.

Requested Charge No. 2 I will give as modified.

Mr. Rutledge: The plaintiff would like to note an exception.

The Court: Requested Charge No. 3 I am denying. That will be considered in connection with plaintiff's Requested Charge on the same subject and makes it unnecessary.

Mr. Dell: Please note an exception.

The Court: Requested Charge No. 4 is consolidated with a similar Charge requested by plaintiff.

Mr. Faircloth: The attorneys for plaintiff would like to note an exception in the record to the Court's [fol. 373] failure to give all Requested Charges as requested.

Mr. Dell: The attorneys for defendant would like to note an exception in the record to the Court's failure to give all Requested Charges as requested.

Whereupon, the conference was adjourned.

The Judge, Jury and all parties reconvened in the Court Room and the following proceedings were had: December 5th, 1957.

The Court: Members of the Jury, we are going to start the argument in this case now. You may proceed Mr. Faircloth.

(Closing Argument By Mr. Faircloth and Mr. Dell)

Charge of the Court

The Court: Members of the Jury, I trust I will not wear you down in giving you the Charge in this case, but I do ask that you listen to me carefully. For you I know this is a case involving a question you seldom ever have to consider.

[fol. 374] Charge of the Court

This is a suit by the plaintiff, Raymond P. Ward, against the defendant, Atlantic Coast Line Railroad Company, in which the plaintiff charges that he was an employee of the defendant railroad. That he was employed in Interstate Commerce. That during the course of his employment with the Railroad he was injured and that this injury was the direct and proximate result in whole or in part to defendant Railroad's negligence.

The defendant Railroad Company denies that the plaintiff was injured during the course of his employment with the Railroad, and that plaintiff's injuries were proximately or directly caused by the Railroad's negligence.

The issues to be decided in this case made up by the pleadings, therefore, are the following:

1. Was the plaintiff, Raymond P. Ward, in the course of his employment by the defendant Railroad at the time he was injured?

Now, as I pointed out to you at the outset of this case, [fol. 375] that is the first question you are to consider when you retire to your jury room. And if you reach a conclusion that he was not so employed, then your verdict should be for the defendant and you will not have to worry about the rest of the testimony. On the other hand, if you reach a conclusion that he was so employed at the time of his injury, then you pass to the second question, which is this:

2. Were the plaintiff's injuries proximately caused in whole or in part by defendant Railroad Company's negligence?

If you resolve both the foregoing issues affirmatively in favor of the plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant, and you should proceed to assess plaintiff's damages in accordance with the Court's instruction to be given you hereafter. On the other hand, if you resolve any one of these issues in favor of the defendant Railroad, then your verdict will be for the defendant.

Now, this case like all other negligence cases does not create a liability on the part of anybody because an accident happened. The right of the plaintiff to recover in [fol. 376] the case depends entirely, setting aside for the moment the question of whether or not he was an employee of the Railroad at the time of his injury, but on that second issue of negligence, depends entirely on the negligence of the defendant. The defendant in this case is not liable, assuming that plaintiff was an employee at the time of his injury, unless the plaintiff has established by a fair preponderance of the evidence in this case that the defendant was in fact negligent.

Now, therefore, I have to give you a brief definition of negligence:

Negligence is the failure to observe for the protection of another's interest such care, precaution and vigilance, as the circumstances justly demand, and the want of which causes the injury.

Now a negligent act or omission for which a party is liable is one that proximately, that is, that in ordinary natural sequence causes or contributes to causing an injury to another when no other independent efficient cause intervenes. Proximate cause is that which naturally leads to or produces a given result. Such a result as might be expected directly or naturally to flow from such cause. [fol. 377] Such a result as naturally suggests itself to the minds of any reasonable or prudent man as likely to flow out of the performance or non-performance of any act.

The defendant, Atlantic Coast Line Railroad, is a corporation and you are instructed that a corporation acts and can act only through its officers, employees or agents. By the same token the corporation is responsible and is liable for the wrongful acts, or negligence, of its officers, employees, or agents, acting within the scope of their employment.

In this case it has been stipulated in the record that the particular track being repaired on the morning when this accident occurred was a private track, not a track belonging to the Railroad, but was a private track, and you have heard the amount of conflicting testimony here as to whether or not this plaintiff knew that fact. But it is important for you to keep in mind that this was a private track and that it was the fact that the work was being done on this private track that raises the question as to whether or not plaintiff was in the course of his employment for the defendant at the time of the accident.

Now, if the defendant Railroad, acting through its fore-[fol. 378] man, leased or hired its employees including plaintiff Ward to another employer without the plaintiff's knowledge or consent in the change of relationship, the defendant Railroad was not thereby replaced as the plaintiff's employer and was not thereby relieved from liability for injuries sustained by the plaintiff in the course of his employment.

Now that is a legal phrase expressing the question and I think I can use other language that maybe can help you understand it better.

The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went

to work that morning. You can understand that if his foreman ordered him back to report for work on Saturday morning without explaining to him what he was going to do, or where he had to work, and he did report back and his foreman carried him off without letting him know any of the facts about what he was doing, the foreman as the Railroad employee and agent would make the Railroad company liable for that act, even if the work was performed on a private track. The evidence on that point is in conflict. [fol. 379] All the Railroad employees testified that they all knew, including Ward, that that was a private job that they were going to perform that morning for the sake of making some extra money. Ward denies that. Ward says that nobody told him that he was going to work on a private track and that he wasn't working for the Railroad Company on that day. So that creates the issue that you have to decide on this question as to whether or not Ward was an employee of the Railroad on that occasion. The Railroad is liable, as I have told you, if the fact he was working on that private track was not disclosed to him and he was not afforded an opportunity to decline to work for a third party.

Now, in this case, we have had some testimony going to the second question of negligence. We have had some testimony here by a witness, an expert witness, brought by plaintiff, that in his testimony criticized the method of employment used by the defendant in the repair of its tracks and the removal and replacement of cross-ties thereon. This witness, as you will recall, was critical of it, testified that it was a dangerous procedure to follow, [fol. 380] and should be stopped.

Defendant at the same time has introduced testimony to the effect that the system practiced by the Coast Line is that generally in use all over the country and has been in effect for years and years and years, and it is safe, not dangerous, and it suffers few, if any, accidents as a result of it.

Now the Court Charges you that a party cannot justify or excuse an inherently negligent act by proving he was customarily negligent in the performing of same or similar acts. In other words, if you should find that the defendant Railroad was negligent toward the plaintiff and that such negligence caused plaintiff's injury, the fact that the rail-

road customarily acted in the same negligent fashion toward the plaintiff and toward its other employees does not justify or excuse such negligence. It is an employer's duty to an employee to use reasonable care and prudence to the end that the place in which the employee is required to work and the tools and the method by which the employees are reasonably suitable and safe for the purpose and in [fol. 381] the circumstances in which the same are to be used.

In determining whether the tools and the method being used by Plaintiff to replace the cross-ties at the time and place of Plaintiff's alleged injury was reasonably suitable and safe, you may consider this common usage and custom practiced by the railroads for doing this type of work, together with the testimony that Plaintiff has offered on the same subject. If you find and believe from the evidence that the place where Plaintiff Ward was then working and the tools and method by which Plaintiff Ward was removing or replacing the cross-ties on which he was working at the time of his alleged injury were reasonably suitable and safe under the circumstances, then the charge of negligence against the defendant Railroad for failure to provide safe tools, safe methods and a safe place to work, you will find the defendant, Atlantic Coast Line Railroad Company, not guilty of negligence.

As stated above, the defendant Railroad has a duty to furnish its employees with a reasonably safe method of work, and if the method prescribed by the Railroad involves [fol. 382] forseeable risks and injuries to its employees which would and could be avoided or eliminated by another readily available method, then the Railroad may be charged with negligence for prescribing a more dangerous and risky method.

The defendant Railroad also has the duty to instruct its employees, and particularly inexperienced employees, concerning the proper and safe way to perform their railroad work. The failure of the Railroad to perform this duty, to properly instruct, may constitute negligence.

The defendant Railroad also has a duty to furnish its employees with sufficient help in the performance of those chores which are too heavy or too burdensome for one man

safely to perform by himself. The failure of the Railroad to perform this duty may constitute negligence.

If, on the other hand, you find and believe from the evidence, that at the time and place of the alleged injury the work which plaintiff Ward was doing was ordinarily a one man's job, reasonably expected to do safely under the [fol. 383] circumstances, then as to the charge of negligence against the defendant for failure to furnish sufficient help, you will find the defendant not guilty of such charge.

It is the duty of the defendant Railroad to provide temporary care for an employee who has, while engaged in the performance of service of his employment, become injured and incapable of caring for himself and to remove the employee to a place of safety and to secure medical care for him or convey him to a hospital, if the circumstances reasonably require such action, and the Railroad Company is liable for its negligence in consequence of its duty.

I am sure that you will recall that that charge is based upon evidence here that this man was seriously injured on the day that he received his injury; that he could not stand up straight, and that he had great difficulty in getting home, and that the Railroad boss made no effort to take care of him.

The plaintiff has introduced in evidence in this case sev- [fol. 384] eral rules from the Rule Book of the defendant Railroad. You may consider only those rules read to you from this Rule Book in determining the question of whether the defendant Railroad was negligent or not. And you are further instructed that a violation of said rules may be considered by you as evidence of negligence. I have requested counsel for the parties to paste on the outside of that book the rules that were read to you. I trust they have done so. If they haven't already done it, I will see that they do it before the book goes out.

You are instructed that if from the evidence your verdict is in favor of plaintiff and against defendant Railroad, then it becomes your duty to allow the plaintiff all the damages that you find will fairly and justly compensate him.

1. For bodily pain and mental anguish, if any, suffered by the plaintiff as a direct consequence of his injury from the time of the accident until the present.

2. For bodily pain and mental anguish, if any, which you may find that the plaintiff is reasonably certain to suffer in [fol. 385] the future as a direct consequence of the injury suffered in this case.

3. For the plaintiff's reasonable doctor, hospital, and medical bills which the plaintiff has reasonably incurred as a result of the accident, up to the present time and which have been proven in this case.

4. For all future doctor, hospital and medical expenses which the plaintiff may be required to bear in the future, as a direct consequence of this accident.

5. For such loss of earnings the plaintiff has suffered from the time of the accident until the present, as a result of the accident.

6. For such permanent impairment, if any, of the plaintiff's ability to earn money or his earning capacity in the future, as you find has directly resulted from his injury.

7. For such loss or impairment of plaintiff's ability to lead a normal life, as you may find the plaintiff has undergone in the past and is reasonably certain to sustain in the future as a direct consequence of his injury.

[fol. 386] As to pain and suffering, the law declares that there is no fixed standard by which to measure, except the enlightened consciences of impartial jurors. The enlightened consciences of each of you. It is your duty in connection with such damage to determine from the evidence what sort of injury the plaintiff received, if any, and their character as producing or not producing pain. The mildness or inability of the pain; its probable duration during the past and the future; and to allow such sum as would fairly compensate plaintiff for all such pain and suffering.

In considering and assessing damages, if any, for the impairment of plaintiff's ability to earn money, you may consider his probable earnings for the present time to the end of his life expectancy; what his earning capacity was prior to the accident and the extent to which that earning capacity or ability to earn money has been reduced by the injury.

In the event you find that plaintiff has been permanently injured and disabled, it will be necessary for you to con- [fol. 387] sider the effect of this permanent disability upon plaintiff's future ability to earn money. In this connec-

tion, Mortality Tables have been read into evidence estimating and determining the life expectancy of the plaintiff involved in this litigation. But you are not bound by these Tables. They may be considered together with all other evidence pertinent to the questions of how long the plaintiff may live.

Now, there is one particular Charge that I have saved to the last, so as to attempt to remove any confusion in the minds of any of you jurors that might remember the case you were on earlier this week, in which I charged you that contributory negligence on the part of the plaintiff would defeat his right to recover. That is not true in this suit. That is not true in any suit against a Railroad Company. We have in Florida what is known as comparative negligence. Where a plaintiff is negligent and the defendant is negligent, the fact that plaintiff may have been guilty of contributory negligence in causing the accident involved does not bar him from recovering damages from the defendant. But if you find from a preponderance of [fol. 388] the evidence in this case that the plaintiff was guilty of some contributory negligence, then you should diminish his damages in proportion to the amount of the negligence attributable to the plaintiff. However, you should not attempt to apportion the damage or diminish plaintiff's damage to any extent unless you find from a preponderance of the evidence that the plaintiff was guilty of negligence. Now, you can understand that this is different to the other Charge I gave you in the other case. The fact that plaintiff may have been negligent will not defeat completely his right to recover.

Now, Members of the Jury, the evidence in this case has been rather long and rather seriously contested, and is in many respects irreconcilable conflicts.

Now, you have heard this evidence that has been submitted in this case, and as in all similar actions, the burden is on the plaintiff to prove his case by a fair preponderance of the evidence. This, Members of the Jury, does not necessarily mean the greater number of witnesses, nor [fol. 389] the greater mass of testimony, or other evidence, but it does mean the greater weight or the greater probative value of the evidence as it appears to you as Jurors. You as Jurors are the judges of the evidence, its weight

and sufficiency, and the credibility of the witnesses. It is for you to say which witness or witnesses you believe and which witness or witnesses you do not believe, if any, and in this connection, you may take into consideration the interest which each witness may have in the outcome of this case, his position and surrounding at the time of the happening of the events concerning which he testified, his conduct or demeanor while on the witness stand, his degree of intelligence as manifested to you during the giving of his testimony, his opportunity and ability to see, recall and relate the facts about which he testified to you from the witness stand. In considering the testimony of all the witnesses, if you find an irreconcilable conflict, it is your duty to try to reconcile that conflict if you can. Of course, you can't do it in this case. So since you will be unable to reconcile the conflict, then it is your problem to discard [fol. 390] the testimony of such witness or witnesses which you deem unworthy of belief and make up and return your verdict on such tetimony as you do believe.

In considering the case, you will accept the law which the Court has given you in these Charges and apply thereto the facts as you believe them to be, coming from the sworn testimony of the witnesses, and such other evidence as the Court has permitted for your consideration. And upon these facts and this law, return your verdict.

You are not to be swayed in the performance of your duty by prejudice, sympathy, or any other sentiment or passion, but you must discuss this case fairly and impartially upon the law and upon the evidence and arrive at your verdict.

Has counsel prepared vedicts?

Mr. Rutledge: No, Your Honor, we haven't. There is one matter that plaintiff would like to discuss with Your Honor out of the presence of the jury before the jury retires. May we have that opportunity?

The Court: One matter?

[fol. 391] Mr. Rutledge: Yes sir.

The Court: Step outside, Members of the Jury.

(Jury out.)

Mr. Rutledge: Your Honor, plaintiff objects to the Charge concerning the employment issue. It was my

understanding you charged the issue was whether Ray Ward was told and instructed this was a private track. Now it is the plaintiff's contention that it must have been explained to Ward, or he must have understood before he was hurt, that he was working for a third party, not for the Railroad. The question was whether this was done before Ray Ward was hurt. The mere fact that Ward was told or knew the track was privately owned——

The Court: You are right about that if I said it that way.

Mr. Dell: I don't think you did, Your Honor.

[fol. 392] Mr. Faircloth: I think you said it that way.

The Court: Do you have the Charge?

Mr. Rutledge: I have the note, that is the way I wrote it out. It is not very legible, but that is the way I wrote it out.

The Court: Bring the jury back.

(Jury in the box.)

The Court: Members of the Jury, there is some confusion among counsel as to what I charged you with reference to the plaintiff's knowledge of what he was doing on the day he was injured and I called you back without taking the time to see specifically what I said, but to recharge you on that point.

I attempted to tell you that the Railroad Company was liable to this man for his injury, if he received an injury that day on that track, and there was any negligence in connection with the performance of his work.

[fol. 393] "That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?

Mr. Rutledge: Your Honor, to make it clear he was working for some third person and not working for the Railroad.

The Court: Yes sir, that is the word I believe he suggested

—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, [fol. 394] but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have to worry about all the other problems. You will retire and consider your verdict."

You may take the exhibits and I will send you the two verdicts up in just a few minutes.

(Jury retired at 11:35 A.M. and returned a verdict at 12:20 P.M.)

The Court: Members of the Jury, have you arrived at a verdict?

Foreman: We have, Your Honor.

The Court: Receive the verdict, Mr. Clerk.

[fol. 395] (Verdict handed Mr. Clerk.)

The Court: Members of the Jury, please rise and hearken to your verdict.

Mr. Clerk:

RAYMOND P. WARD, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD, A VIRGINIA CORPORATION, Defendant

VERDICT

We, the Jury, find the defendant, Atlantic Coast Line Railroad Company, not guilty. So say we all. Dated this 5th day of December, 1957.

William P. Hunter, Foreman.

The Court: Is that your verdict?

Foreman: Yes sir.

The Court: Let the verdict be recorded. Be seated just [fols. 396-397] a moment.

Reporter's Certificate (omitted in printing).

[fol. 398] Plaintiff's Requested Instruction No. 2

One of the issues to de decided in this case is whether or not the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured. This issue must be determined from all of the circumstances of the case. The primary factor to be considered is whether or not the railroad had the power to direct, control, and supervise the plaintiff in the performance of his work at the time he was injured. Other relevant factors to be considered are: who selected and engaged the plaintiff to perform the work; who furnished the tools with which the work was performed; who paid the plaintiff his wages for the performance of the work; the amount of scale of such wages; and who had the power to fire or dismiss the plaintiff from the work.

If you find that the railroad, through its foreman, I. H. Keen, had the power to direct, control and supervise the plaintiff in the performance of the work he was doing at the time he was injured, then you should find that the plaintiff was employed by the defendant railroad at the time he was injured.

Authority: Stevenson v. Lake Terminal R. Co. (6th Cir., 1930), 42 F. 2d 357; Cimorelli v. New York Cent. R. Co. (6th Cir., 1945), 148 F. 2d 575; Dougal v. Spokane, P. & S. Ry Co. (9th Cir., 1953), 207 F. 2d 843; Woodward Iron Co. v. Limbaugh (5th Cir., 1921), 276 F. 1.

Given
Rejected √

[fol. 399] PLAINTIFF'S REQUESTED INSTRUCTION No. 4

The fact that the money used to pay the plaintiff Ward for the work he was doing at the time he was injured came originally from some third person with whom the railroad or the owner of the spur track had made an arrangement, does not remove the defendant railroad from its employer-employee relationship with the plaintiff Ward and does not relieve the defendant railroad of liability for injuries suffered by the plaintiff during the course of his railroad employment as a result of the defendant railroad's negligence.

Authority: Chicago, R.I. & G. Ry Co. v. Trout (Tex. Civ. App., 1920), 224 S.W. 472.

Given
Rejected √

[fol. 400-410] PLAINTIFF'S REQUESTED INSTRUCTION No. 5

The accident here involved occurred upon a spur track which was partly owned by the M. & M. Turpentine Co. The fact that the M. & M. Turpentine Co. had contracted with the defendant railroad to maintain all or a portion of this spur track does not relieve the defendant railroad of its liability to the plaintiff if the plaintiff was injured during the course of his employment with the defendant railroad on the spur track as a direct consequence, in whole or in part, of the defendant railroad's negligence.

Authority: Ruddy v. N. Y. Cent. R. Co. (2nd Cir., 1955), 224 F. 2d 96, cert. den., 350 U.S. 884.

Given
Rejected √

PLAINTIFF'S REQUESTED INSTRUCTION No. 6

The Court charges you as a matter of law that the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured.

Given
Rejected √

PLAINTIFF'S REQUESTED INSTRUCTION No. 7

The Court charges you as a matter of law that the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured, and that his employment was in interstate commerce.

Given
Rejected √

[fols. 411-415] DEFENDANT'S REQUEST FOR INSTRUCTIONS

INSTRUCTION No. 1

Employment

If after a full consideration of all the evidence, you find and believe from the evidence that the Defendant Atlantic Coastline Railroad Company was not the owner and did not have the responsibility for making repairs to the railroad siding, on which Plaintiff Ward was working at the time of his alleged injury, and that at such time and place Plaintiff Ward was on his day off from regular railroad employment, had volunteered to help repair said railroad siding, and looked to the owner and not to the Defendant Railroad to be paid for his work in making such repairs, then the Court charges you that under these circumstances the Plaintiff would not be in the employment of the Defendant Atlantic Coastline Railroad Company in performing such work, and irrespective of any other issue or issues presented for your finding and determination, you must find the Defendant Atlantic Coastline Railroad Company not guilty.

[fol. 416] IN UNITED STATES DISTRICT COURT

JUDGMENT—December 3, 1957

At a stated term of the District Court of the United States for the Northern District of Florida, begun and held in the City of Gainesville, Florida, upon the 3rd day of December, A.D. 1957. Present the Honorable Dozier A. DeVane, Judge. Among proceedings had were the following:

Now at this time the above entitled cause came on for trial pursuant to order, and the respective parties being present

and represented by counsel and announcing they were ready for trial, upon motion of the parties came the following jury of eleven persons, counsel for the respective parties having consented to a jury of eleven when the panel was exhausted, to-wit:

1. Joseph D. Brooks
2. Albert H. Cellon
3, Mrs. Leah J. Graham
4. Emmett E. Holloway
5. Hester C. Horn
6. William P. Hunter
7. Joe Johnson
8. Paul Norfleet
9. Oscar W. Perry, Sr.
10. William Van Poppering
11. Harry L. Wooten

who, being first duly chosen, tried and sworn to try the issues joined in said cause, after hearing evidence adduced on behalf of plaintiff and the hour of adjournment having been reached, were permitted to separate for the night under instructions by the Court and court was ordered adjourned until 9:30 A.M., December 4, 1957.

And afterwards, to-wit: on December 4, 1957, the following proceedings were had in the above entitled cause, to-wit:

Now at this time court was convened pursuant to order, and the respective parties being present with counsel, and the jury being present and in the jury box, trial of said cause was resumed with further testimony.

[fol. 417] And afterwards, to-wit: upon the same day, when the hour of adjournment was reached the jury was permitted to separate for the night under instructions by the Court and court was ordered adjourned until 9:30 A.M., December 5, 1957.

And afterwards, to-wit: on December 5, 1957, the following proceedings were had in the above entitled cause, to-wit:

Now at this time court was convened pursuant to order, and the respective parties being present with counsel, and the jury being present and in the jury box, trial of said cause was resumed with the argument of counsel, and the charge of the court.

An the jury, after having heard all of the testimony, the argument of counsel, and charge of the Court, retired to consider their verdict, and after due deliberation, returned into court and presented the following verdict, to-wit:

VERDICT

We, the Jury, find the Defendant, Atlantic Coast Line Railroad Company, not guilty.

So say we all.

Dated this 5th day of December, 1957.

/s/ William P. Hunter, Foreman.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—December 5, 1957

The above entitled cause having come on for trial before the Court and Jury, the Honorable Dozier A. DeVane, presiding, and the issues having been duly tried, and the jury, on December 5, 1957, having rendered a verdict finding the Defendant, Atlantic Coast Line Railroad Company, a Virginia corporation, not guilty.

[fol. 418] It is Considered, Ordered and Adjudged that the Plaintiff, Raymond P. Ward, take nothing as in this action he has demanded, and that the defendant, Atlantic Coast Line Railroad Company, a Virginia Corporation, go hence without day, and the defendant recover of said plaintiff, Raymond P. Ward, its costs in this action expended to be taxed by the Clerk in accordance with law, for which execution may issue.

[fols. 419-424] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 6, 1958

Notice is hereby given that Raymond P. Ward, plaintiff above named, hereby appeals to the United States Court of

Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 5, 1957.

Dated this 2nd day of January, 1958.

Hector, Faircloth & Rutledge, Attorneys for Plaintiff, 835 duPont Building, Miami 32, Florida. By: Earl Faircloth

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CERTIFICATE OF SERVICE (omitted in printing)

[fols. 425-442] Clerk's Certificate to foregoing transcript omitted in printing

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[fol. 443] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 13, 1959.

(omitted in printing)

[fol. 444] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17166

RAYMOND P. WARD, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, Appellee

Appeal from the United States District Court for the Northern District of Florida

Before Rives, Tuttle and Cameron, Circuit Judges.

OPINION—March 12, 1959.

Tuttle, Circuit Judge: This is an appeal by the plaintiff from a judgment following a jury's verdict for the defendant in an action under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, for damages for personal injuries

allegedly caused by the negligence of his alleged employer, the railroad defendant.

[fol. 445] Before we can consider the merits of the appeal we must pass upon appellee's motion to dismiss for failure to file timely notice of appeal.

Judgment was entered against appellant in the United States district court in Gainesville, Florida, on December 5, 1957. According to appellant's uncontroverted affidavits, appellant's counsel in Miami, Florida, mailed a notice of appeal by air mail to the clerk of the district court in Gainesville, depositing it in a United States mail depository at about 5:00 P.M. on January 2, 1958. The clerk's office in Gainesville has only one employee, the deputy clerk. She was absent from the office on annual leave on January 2 and 3, 1958, and the office was therefore not open on those days. The office was also closed the following day, Saturday, January 4, 1958. It had been regularly closed on Saturdays since February 13, 1956, due to the fact that in order to keep the office open six days a week with only one employee it would have been necessary for her to work more than the forty hours of a federal employee's regular work-week.

Since no one was there to open the mail until Monday, January 6, appellant's notice of appeal was not marked as received and filed by the clerk's office until that date, which was one day after the time for filing notice of appeal had expired.[1]

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[1] The applicable statute reads in part:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C.A. §2107.

The applicable rule of procedure reads in part:

"When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . . .

"A party may appeal from a judgment by filing with the district court a notice of appeal . . . ." F.R.C.P. 73.

[fol. 446] Appellant's affidavits assert that the notice should, in the ordinary course of air mail delivery, have arrived at the post office in Gainesville on Friday morning, January 3, and if so it would have been received in the clerk's office, located in the post office (or received in the post office box which appellant states is maintained by the clerk), during regular business hours on January 3 if the office had been open as required by F.R.C.P. 77(c).[2] His affidavits further assert that if, contrary to the best recollection of the clerk who mailed it, the notice was sent by regular mail rather than by air mail, then the notice of appeal would have been received during business hours on Saturday, January 4. Appellant contends that Rule 77(c) required the Gainesville office to be open on Saturday mornings, which were regular business hours in that community; and that appellant's counsel had a right to assume that the clerk was complying with this requirement.

Accepting these uncontroverted facts as true, we conclude that appellant is entitled to the presumption that his notice of appeal was placed in the post office box of the clerk of the district court within the required time, notwithstanding the failure of the clerk or his deputy manually to take possession of and mark the notice "filed" until Monday, [fol. 447] January 6, 1958. Being in the custody of the clerk, it met the requirement[3] that it be "actually" received in the clerk's office within the thirty-day period.

In so ruling we do not depart from the well-established principle that the jurisdictional[4] requirement that notice be filed within thirty days is not met by deposit of notice in the mail in time for it to reach the clerk's office in the usual course of mail delivery within the time allowed.[5] The distinction here is that the failure to mark the notice "filed"

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[2] The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays . . . ." F.R.C.P. 77(c)

[3] Casalduc v. Diaz, 1 Cir., 117 F. 2d 915.

[4] Knowles v. United States, 5 Cir., 260 F. 2d 852, 854; Marten v. Hess, 6 Cir., 176 F. 2d 834.

[5] See Poyner v. Commissioner, 5 Cir., 81 F. 2d 521; cf. Lejeune v. Midwestern Ins. Co. of Oklahoma City, Okla., 5 Cir., 197 F. 2d 149.

can be attributed to the absence of the clerk, whereas in the usual case such failure is taken to indicate that it was not actually in the custody of the clerk.

Nor do we pass upon the correctness of the rule applied in *Casalduc* v. *Diaz*, 1 Cir., 117 F. 2d 915, cited by appellee. In that case the appellant's counsel swore that he had slipped a notice of appeal under the clerk's door after business hours. The court held that the notice had not been placed in the actual custody of the clerk by this action and therefore it had not been filed according to law. The court clearly believed that the attempted filing had taken place *after business hours* on the last day of the legal period. Under such circumstances, it stated that the proper procedure for counsel to follow was to seek out the clerk or deputy clerk and to deliver the notice to him personally. We are not presented with such circumstances here. We have concluded that the notice was placed in the clerk's [fol. 448] post office box during regular business hours on a day of the week when the clerk's office was regularly open for business. We see no reason to require counsel in another city to take affirmative steps to learn whether anyone was in the office during such hours and if no one was in the office, to seek out the clerk or his deputy.

We hold nothing more than this: It is the time when the clerk receives actual custody of the notice which determines whether this court has jurisdiction over the appeal,[6] and under circumstances such as are present in this case, the notice may be received in the clerk's custody and control even though it has not yet been manually handled and marked "filed" by the clerk or his deputy.

We turn to a consideration of the merits of this appeal.

The trial below produced conflicts in the evidence relating to several major issues, but only one of these issues is argued on appeal. This is the issue as to whether appellant was working as appellee's employee when his injury allegedly occurred. He was allegedly injured while working on a privately owned siding which was connected with appellee's tracks. The siding was built by the defendant railroad for the primary use, and at the expense, of a turpen-

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[6] See Silverton v. Valley Transit Cement Co., 9 Cir., 237 F. 2d 143.

tine company which owned the land on which it lay, but during the season when watermelons were harvested in that neighborhood the siding was also, by permission of the owner, used to load cars with watermelons, which would be shipped on appellee's tracks. It was stipulated by the parties that the siding was used in interstate commerce. [fol. 449] The turpentine company had agreed with the railroad that it, the turpentine company, would maintain and repair the side tracks so as to conform to the railroad's maintenance and safety specifications. Appellee's track foreman in charge of the section of appellee's track which connected with the turpentine company's siding was, according to appellee's rule book, responsible "for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds" within this section. However, he testified that his duty with respect to private tracks was limited to inspection and did not include the duty of maintenance which he had with respect to the railroad's own tracks. This was reiterated by the testimony of the superintendent of the local district of the Atlantic Coast Line Railroad.

The foreman, I. H. Keene, inspected the siding shortly before the day of the accident here involved and he found that the track needed repair. He informed the turpentine company's president, D. P. McKenzie, about these findings, and as was customary, McKenzie asked Keene if he would see that the tracks were fixed so as to meet the railroad's regulations. Keene agreed to do this, and on Friday, May 21, 1954, after his repair crew had finished its regular, five-day, forty-hour work-week, he asked the crew, which included appellant as its apprentice foreman, if it would like to repair the McKenzie siding the following day, for which it would be paid at overtime rates. The crew agreed to do it, and the next day, Saturday, the men reported to work at the railroad's tool shed at their usual reporting time, [fol. 450] took their regular railroad tools and proceeded to the McKenzie siding, where they began replacing some defective ties. McKenzie was present when the men arrived at the job site, but he left soon thereafter and the work was carried out under foreman Keene's direction. In the course of this work, appellant allegedly received the injury which is the subject of this action.

Pointing to these facts, appellant says the injury occurred in the course of his employment by appellee and he asserts that appellant cannot avoid liability for it by means of any arrangement with McKenzie governing maintenance of the siding. Appellee contends, on the other hand, that the rest of the facts of the case support a finding that appellant was working for McKenzie and not for appellee.

The facts relied upon by appellee include the following: It was admitted that this siding was owned by the turpentine company, not by appellee. It was stated without contradiction by the witness Keene that he had no duty to keep privately owned sidings in repair.[7] Appellee's other witnesses testified that the railroad company itself had no such duty.

Keene testified that he and his crew had repaired private tracks on numerous occasions and that they had never done it on a regular work day; it had always been on Saturday, [fol. 451] their day off. Appellee's witnesses admitted that appellee's management knew of this practice whereby the railroad's employees, using the railroad's tools, repaired privately-owned sidings on their day off; but they testified that no one connected with appellee's management had ordered Keene to make these repairs.

Keene testified, and it may be taken as true, that the crew's regular Atlantic Coast Line wages were paid twice monthly by Atlantic Coast Line checks, but when it worked on private tracks on Saturdays the men were paid at the end of each day's work—either in cash or by a check drawn on the account of the owner of the tracks. That is what occurred on this occasion.

Keene also testified, and his testimony was supported by the testimony of the two other members of the crew who testified, that when he told the crew about the McKenzie job he merely offered them a chance to earn some extra money on their *way* off and did not order them to work. He testified that if the men did not choose to work on these jobs, this would not affect their standing with the rail-

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[7] The only evidence which came close to contradicting this was the aforementioned rule book and appellant's testimony that Keene had informed him that the roadmaster had "told him [that the crew] had to repair this particular siding."

road in any way. Keene and the two laborers testified that the crew, including appellant, *voluntarily* agreed to work and *voluntarily* agreed on the time they would report to work. Keene and one of the laborers testified that when the men reported on Saturday he warned them that they would be working for McKenzie and not for the railroad and therefore they should be careful to avoid any accidents. Keene testified that he thought he had also told them this on Friday, but he was not certain. He said he had definitely told appellant on previous occasions that he would be working for someone other than the railroad.

[fol. 452] All of the testimony on this last point was contradicted by appellant. He testified that on Friday, May 21, 1954, Keene told the crew to report for work on Saturday at the regular time to repair the McKenzie siding; that Keene had told him that Mr. Sanders, appellee's roadmaster, had told Keene to repair the siding; that he was never told he was working for McKenzie; and that he believed he was working for appellee that Saturday.

With the evidence in this posture, the trial court charged the jury that appellant was working on the siding as appellee's employee unless he had been told beforehand that he would be working for a third party and he had accepted the job with this knowledge. The court instructed the jury that if they found that he had known this when he went out to work that Saturday he could not recover.[8] The jury awarded a general verdict of no recovery and judgment was entered thereon.

Appellant's arguments are directed at the court's charge to the jury. First, he says the court erred in refusing to charge that, as a matter of law, appellant was employed by the railroad at the time he was allegedly injured. Alternatively, he argues that the court erred in refusing to charge the jury concerning "the usual and standard legal criteria for determining the employer-employee relationship"—that is, the locus of the power to control the employee and to dismiss him, the source of his wages, and so forth.

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[8] The railroad was the only party named as a defendant in this suit.

In passing upon appellant's contentions we start from the premises, first, that the appellee could incur no [fol. 453] liability under the F.E.L.A. for appellant's injury unless there existed an employer-employee relationship between the parties at the time of the accident, *Robinson* v. *Baltimore & O. R.R.*, 237 U.S. 84; *Chicago, Rock Island & Pac. Ry.* v. *Bond*, 240 U.S. 449, and second, that the terms "employee" and "employed" in the F.E.L.A.[9] are used in their usual and natural sense, importing the conventional relation of employer and employee. *Robinson* v. *Baltimore & O. R.R.*, 237 U.S. 84, 94.

It is a fundamental principle of law that the relation of employer and employee is a relation created by contract, either express or implied. *New Amsterdam Cas. Co.* v. *Soileau*, 5 Cir., 167 F. 2d 767; *Fleming* v. *A. H. Belo Corp.*, 5 Cir., 121 F. 2d 207, aff'd, 316 U.S. 624. If appellant failed to prove that he had a contract of employment with appellee covering this Saturday labor, then he cannot recover damages from appellee in this action.

The possibility that appellant could have been repairing the McKenzie siding under an express contract with appellee is easily dismissed, for as the foregoing recital of facts demonstrates, the evidence permitted the jury to find that Keene had told appellant, and appellant believed, that he was working for McKenzie, not for the railroad. Although appellant argues that by virtue of its charge to the jury the court enroneously held as a matter of law that appellant was not working for the railroad and permitted the jury to consider only the question of whether he *knew* [fol. 454] it, a reading of the complete charge on this issue makes it clear that the court did not. It carefully charged the jury that the "Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money." In other words, the court reduced the issue of employment to the narrow question of whether "he was . . . advised ['that he was working for some third person and not the Railroad'] before he went out there to work,

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[9] 45 U.S.C.A. §51.

and he went out on his own volition and joined the others to make some extra money." [10]

[fol. 455] The cases cited by appellant to show that the court should have charged the jury that the question of employment should be resolved by weighing "the usual and standard legal criteria for determining the employer-employee relationship" are all distinguishable from, and in-

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[10] The pertinent portions of the court's charge concerning the employment issue were as follows:

> "That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?
>
> Mr. Rutledge: Your Honor, to make it clear he was working for some third person and not working for the Railroad.
>
> The Court: Yes, sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have to worry about all the other problems. You will retire and consider your verdict."

applicable, to the present litigation. One group [11] of these cases involve the "borrowed servant" situation wherein an employee is loaned by his general employer to another employer and there is no direct proof that the employee had actual knowledge of, or gave his consent to, a change in employment, and it is thus necessary to weigh all of these "usual and standard legal criteria" to determine whether the employee has in fact changed employers. We hold that the lower court correctly ruled, in effect, that even if all the indirect evidence—i.e., right to control, source of wages, etc.—tended to show that appellant was acting in appellee's employ at the time of his injury, the jury should nevertheless find that he was not so employed if they found from other evidence that he had *agreed* to work that Saturday *for McKenzie* or (what amounts to the same thing) he understood that his regular employer *refused* to extend its contract of employment to cover this work.

If the charge erred, it erred in appellant's favor, for when the court charged "that the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not [fol. 456] working for the Railroad" it resolved all the circumstantial evidence, such as the right to control the crew's work, in favor of the applicant, although the evidence was subject to varying inferences and might have been resolved differently by the jury. The only question which the court did not resolve in appellant's favor was the question whether the parties had made an *agreement* that appellant would work for appellee or an *agreement* that he would work for McKenzie.[12]

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[11] Linstead v. Chesapeake & O. Ry., 276 U.S. 28; Geraghty v. Lehigh Valley R.R., 2 Cir., 70 F. 2d 300; Halderman v. Pennsylvania R.R., 2 Cir., 53 F. 2d 365; Woodward Iron Co. v. Limbaugh, 5 Cir., 276 Fed. 1; The Slingsby, 2 Cir., 120 Fed. 748.

[12] Depending on whose version of the facts was correct, Keene was authorized either by Atlantic Coast Line or by M. and M. Turpentine to make an offer to a contract of employment.

The second group of cases [13] cited by appellant to support his contention that the court should have submitted these criteria to the jury involve a question which is related to but not the same as the loaned servant doctrine just discussed. They are concerned with whether the employee of an alleged independant contractor is to be considered as an employee of the railroad which contracted for the services of the independent contractor, so as to permit the employee to sue the railroad under the F.E.L.A. Here too the courts discussed the criteria presented here by appellant, but in none of these cases were the courts dealing with an employee who had been expressly told beforehand that he would not be working for the railroad. In none of them, therefore, was there an issue as to whether the parties had expressly negated the existence of the legal relation which the circumstantial evidence established as a matter of fact or of legal construction. Thus it was proper there, but improper here, for the issue to be decided by the [fol. 457] application of these legal criteria to the circumstantial evidence of employment.

Consideration of this last group of cases brings us to the question whether, despite the expressly manifested intent of the parties not to enter into a relation of employer and employee, they have, by their conduct, unwittingly (or even unwillingly) entered into such a relation.[14] This is the

[13] Dougall v. Spokane, P. & S. Ry., 9 Cir., 207 F. 2d 843; Pennsylvania R.R. v. Barlion, 6 Cir., 172 F. 2d 710; Cimorelli v. New York Cent., 6 Cir., 148 F. 2d 575.

[14] Cf. Atlantic Coast Line Railroad v. Treadway, 120 Va. 735, 92 S.E. 560 (1917), cert. denied, 245 U.S. 670, where the Virginia court observed:

> "The word 'employer' and more especially the word 'employee,' considered apart from their text in the federal act [F.E.L.A.], are ambiguous in their meaning. They may be limited in meaning by the idea that an express contract of hiring by the carrier of and the payment of wages by the latter to the employee are essential to bring him within the provisions of the act. Or they may have a broader meaning and include as employees all who are engaged in the discharge of duties of servants of the carrier, whose service is knowingly accepted by the latter."

question raised by appellant's other major contention: that he was covered by the F.E.L.A. as a matter of law.

Appellant's theory is that the McKenzie siding and the maintenance thereof were part of appellee's "total enterprise" [15] and the arrangement between McKenzie and appellee concerning the maintenance of the siding was simply an illegal device to avoid liability under the F.E.L.A.

It should be obvious at the outset that the statutory provision [16] against devices to avoid the employer's [fol. 458] liability cannot be used to prove the existence of the legal situation—the employer-employee relationship—which calls into play both the statute creating this liability and the provision thereof which forbids any devices intended to avoid such liability. In *Robinson* v. *Baltimore & O. R.R.*, 237 U.S. 84, the Supreme Court construed a Pullman Company employee's contract of employment which released from liability all railroad companies over whose tracks he might travel in the course of his service for Pullman. He contended that the contract was rendered illegal and void by the predecessor of the provision relied upon by appellant. The court stated, 237 U.S. at 91:

> "The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employes' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the Railroad Company within the meaning of the Act."

When we examine the cases cited by appellant we find that none of them applies to the set of facts with which we are dealing. *Atlantic Coast Line R.R.* v. *Meeks,* Tenn. App., 208 S.W. 2d 355, cert. denied, 333 U.S. 327, and *Virginia Ry.* v. *Early,* 4 Cir., 130 F. 2d 548, both involved injuries to employees who were engaged in activities "nec-

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[15] Sinkler v. Missouri Pac. R.R., 256 U.S. 326, 331.

[16] "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C.A. §55.

essarily incident'' to actual service for the railroad. In the one case the employee was resting in a shanty car provided by the railroad for a repair gang which was ''on call'' by the railroad at all times, and in the other case [fol. 459] the injured employee was on the railroad's property returning from a company-maintained lunchroom to the machine shop where he worked for the railroad. We think it clear that the court below could not have ruled as a matter of law that appellant's voluntary work on this privately-owned siding on his regular day-off was a ''necessary incident'' of his regular employment. Even if it be conceded, *arguendo,* that the doctrine was applicable at all, the court would have been obliged by the evidence, including testimony that appellant's position with appellee would not have been jeopardized if he had declined to do this extra work, to submit the question to the jury, as the court did in *Atlantic Coast Line R.R.* v. *Meeks, supra.*

Chicago, R.I. & G. Ry. v. *Trout,* Tex. Civ. App., 224 S.W. 472, and *Terminal R. Ass'n of St. Louis* v. *Fitzjohn,* 8 Cir., 165 F. 2d 473, involved the loaned servant situation discussed earlier in this opinion. Neither of the plaintiffs in these cases consented to a change of employers,[17] whereas as we have seen, there was a clear jury question as to whether appellant Ward consented to work for someone other than the Atlantic Coast Line, his regular employer. [fol. 460] *Erie R.R.* v. *Margue,* 6 Cir., 23 F. 2d 664, also cited in support of appellant's contention that he was covered as a matter of law, is in some ways closer to the present case, but there are legal differences between the

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[17] In the Fitzjohn case the plaintiff's testimony that he had never been advised of nor consented to a change in employment was uncontradicted, 165 F. 2d at 476, and the other evidence on this point was all in his favor. Therefore the trial court was able to rule as a matter of law that the plaintiff was still in the employ of his regular employer. In the Trout case it was the railroad which contended that the question of employment should be decided as a matter of law. The appellate court held that the evidence was sufficient to submit the question of the employee's consent to the jury, 224 S.W. 474, and the jury verdict in favor of the employee was allowed to stand.

two situations and these demand different legal conclusions. The Margue case involved a contract by which the defendant railroad employed a construction company to maintain the railroad's tracks, roadways and structures, using its own employees. The railroad company agreed to furnish, without charge, the tools, camp cars, laborers' quarters, train equipment, work train service, and telegraph service needed for the work, to carry the necessary supplies over its lines, to pay for the labor and material used in the work, and to pay the construction company for its services five per cent. of the cost of such labor and materials. The construction company agreed to comply with the workmen's compensation laws of the state in which it was operating, and the railroad agreed to reimburse it for all expenses incurred under these laws. The court held that an employee of the construction company was an employee of the railroad and that this contract was inoperative to insulate the railroad from liability, because Section 5 of F.E.L.A. nullifies all contracts intended to exempt carriers from their liability under the Act.

The court distinguished the decisions of the Supreme Court which had held that the claimants involved therein were not employees of the defendant railroads, but rather of independent contractors.[18] The court drew the following significant distinction:

> [fol. 461] "It might well be argued that the duty of a railroad company to maintain its right of way, over which it and it alone operates its trains, cannot be delegated to another, so as to relieve the company of any part of its responsibility therefor—certainly, not as to the public which it serves, and perhaps not as to those who work upon its tracks. Whether that be so or not, that responsibility is quite a different thing from the services involved in the cases referred to—the loading or unloading of cars with coal at a terminus, or the performance of a special service, such as express and sleeping car companies perform, *and which the railroad is not legally bound to perform.*

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[18] Wells Fargo Co. v. Taylor, 254 U.S. 175; Chicago, R.I. & Pac. R.R. v. Bond, 240 U.S. 449; Robinson v. B. & O. R.R., 237 U.S. 85.

The maintenance of defendant's railroad tracks was essential to the exercise of its franchise. . . ." (Emphasis added).

This distinction is also of manifest importance in the appeal before us. Unless appellant has proved that the duty to maintain this privately-owned track has been assumed by, or was imposed by law on, the Atlantic Coast Line, then the question is not whether the railroad *could legally* insulate itself from its liability as employer of the maintenance crews by agreeing with the owner that he would bear this responsibility; the question is simply whether or not appellee did in fact do this.

When the railroad learned that the turpentine company wished to have a railroad siding, there was presumably a variety of arrangements whereby it could have satisfied the turpentine company's wishes. We may assume that some of these alternatives would have imposed the duty of maintenance on the railroad. However, the railroad [fol. 462] chose to avoid this responsibility. It built the siding at the turpentine company's expense and had the turpentine company assume the responsibility of maintaining this siding—which it would own—in conformity with appellant's safety standards in order to make it possible for the railroad to send its cars upon this siding. At this juncture it was still possible for the railroad to assume the responsibility; for in discharge of its duty of repair and maintenance the turpentine company might either hire its own employees or it might ask the railroad to direct the latter's employees to do the necessary work. In the one case the railroad would be responsible for the employees' safety; in the other case the responsibility would rest upon the turpentine company.

Appellee contends that it managed to avoid the first alternative. Appellee's witnesses testified that the railroad had no duty to maintain this siding; that foreman Keene was requested by the president of the turpentine company and not by any railroad officer or employee to repair these tracks; and that the workers were all told they would be working for a third party and not for the railroad. It is undisputed that the third party paid the men's wages. Against this testimony which tends to show that the railroad never did assume the duty of maintenance, appellant

is able to point to the railroad's book of operating rules and the circumstantial evidence—the customary use of appellee's employees and tools, etc.—which tended to show that as a matter of actual practice, the railroad did assume the duty.

As for the rule book, the jury was entitled to believe appellee's witnesses who said that the rule making the [fol. 463] section foreman responsible "for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds" within his section actually obligated him merely to inspect the private tracks and to report defects to their owners. The effect of all the circumstantial evidence has been discussed earlier in this opinion, and at this point we need only state virtually the same thing we stated there—that in effect the court's charge interpreted these facts as establishing that if the railroad had not expressly manifested its intent to the contrary, then it had assumed the duty of caring for the McKenzie siding and had employed appellant for the purpose of performing that duty.

We come, finally, to a consideration of the possibility that there was a duty imposed on appellee by law, regardless of its consent, to maintain these private sidings, and that either (1) this duty could not be delegated to independent contractors—not even the owners of the sidings—or (2) that if it did delegate it to a third party, the employees of that other party would nevertheless be employees of appellee.

Appellant has cited no decisions extending a railroad's responsibility as far as this; nor have we found any in our own research. In *Erie R.R.* v. *Margue, supra,* the duty to maintain the tracks arose out of the fact that "the maintenance of [the] defendant's tracks was essential to the exercise of its franchise rights." 23 F. 2d at 665. However, we do not understand that every private siding upon which it sends its cars primarily for the use and benefit of the siding's owner is part of the railroad's fran- [fol. 464] chise or that because of this the railroad is bound to keep it in repair. Nevertheless, even if there were somehow a duty on the railroad to maintain this trackage "in the exercise of its franchise rights," it is not certain that this duty would be nondelegable in the same

way that the duty to maintain the railroad's main right of way would or might be. Compare *Erie R.R.* v. *Margue, supra,* with *Dougall* v. *Spokane, P. & S. Ry.,* 9 Cir., 207 F. 2d 843. However, we need not attempt to resolve this question here, since we are only dealing with a privately-owned siding on private property.

When we examine the cases decided by the Supreme Court we find that it has recognized the right of a carrier to avoid liability under the Act by delegating to independent contractors various functions which appear to be more integrally a part of the carrier's franchise or its general operations than the one with which we are presently dealing. *Robinson* v. *Baltimore & O. R.R.,* 237 U.S. 84, upheld a contract of employment which made a porter in charge of a Pullman car an employee of the Pullman Company and not of the railroad. In *Chicago, R.I. & Pac. Ry.* v. *Bond,* 240 U.S. 449, the Court recognized the right of a railroad to delegate the job of unloading and loading coal on the carrier's locomotives at one of its terminals to an independent contractor. It was held that the contractor was not an employee of the railroad and therefore he was denied the benefits of the F.E.L.A. Cf. also *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175. Similarly, in the present case, we hold that Atlantic Coast Line was not restrained by law from declining the responsibility of maintaining the McKenzie siding.

[fol. 465] It is appellant's contention, however, that the maintenance of this siding was, in accordance with the recent decision in *Sinkler* v. *Missouri Pac. R.R.,* 356 U.S. 326, a part of appellee's "total enterprise," and therefore he was an employee of appellee while he was participating in this aspect of the "common endeavor." In the Sinkler case the plaintiff was employed as a cook in the private car of the defendant railroad's general manager. He was at work in the car when a switching crew, employed by another railroad, undertook to switch the car from one track to another in the Union Station at Houston, Texas, and negligently jolted the car, injuring the plaintiff. The function of switching cars in the Houston area had been contracted to this other railroad by the defendant and all other carriers operating in that area. The question to be decided was whether the defendant was liable for the neg-

ligence of employees of this independent contractor. Interpreting Section 1 of the F.E.L.A., which makes carriers liable to their employees for injuries resulting from the negligence "of any of the officers, agents, or employees of such carriers," [19] a majority of the Court were of the opinion that the members of the switching crews were the defendant's "agents," and two Justices felt that they were performing nondelegable duties of the defendant railroad. The railroad was consequently held responsible for the injuries they negligently caused.

In passing upon the relevance of that decision to this case we must take into account the distinction which the Supreme Court made in reaching it. First, the majority opinion made repeated references to the fact that the func-[fol. 466] tion which the independent contractor was performing was a "vital operational activity" [20] of the defendant's enterprise. The activity—the switching of all of the defendant's cars used in its regular operations in the Houston area—was a necessary and indispensable part of the defendant's regular operations; which contrasts with the incidental part which the turpentine company's private siding played in appellee's operations.

We need not rely upon this distinction, however, nor need we inquire whether a controlling distinction lies in the fact that, as the Supreme Court noted, the Sinkler case fell within the ambit of the common law doctrine that a carrier could not avoid its liability of respondent superior by delegating to independent contractors its *operational* activities, or in the fact that Sinkler involved the issue of whether the negligent party was sufficiently closely connected to the carrier to incur liability whereas this case involves the question whether the injured party was so connected. It is sufficient to note that the majority of the Court expressly refrained from making any implication that the statutory terms "agents" and "employees" were coextensive or that the members of the crew employed by this independent third party were *employees* of the railroad. It limited its decision to the holding that they were "agents," within the majority's broad interpretation of

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[19] 45 U.S.C.A. §51.

[20] 356 U.S. at 327, 328-29, 331.

that statutory term.[21] In so deciding, the Court apparently [fol. 467] conceded the continuing validity of the rule of *Robinson* v. *Baltimore & O. R.R., supra,* denying coverage to employees of carriers' independent contractors; for it distinguished that issue from the iesue before it in the Sinkler case, without manifesting any inclination to discredit or disapprove of its decisions which disposed of the former issue adversely to employees.[22]

We therefore conclude that the Sinkler decision does not warrant an abandonment of the conclusion, which we reach on principle and authority, that either there was no duty on appellee to care for this private siding or if there was, it was a duty which appellee could lawfully delegate to others.

To sum up what we have said in the foregoing discussion, the trial court correctly refused to rule that appellant was injured in the course of employment for appellee, because the appellee's evidence raised an issue of fact on a point which was capable of outweighing all of the evidence pointing in appellant's favor, and because there was nothing which prevented or rendered illegal an agreement permitting a third party to assume responsibility for this maintenance and repair and to hire anyone, including appellee's regular employees, to discharge this task. Second, [fol. 468] with the issue properly reduced to the factual question whether appellee had or had not hired appellant to do this work, the court committed no reversible error in refusing to submit this issue to the jury's consideration by charging them as to the criteria which are usually ap-

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[21] The Court began its discussion of the law involved with this statement:

> "A railroad's liability under § 1 of the F.E.L.A. is to compensate its employees in damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or employees' of such carrier. 45 U.S.C. §51. No question of liability for the fault of officers or employees of the respondent is here raised, but only whether the petitioner's injuries were due to the fault of 'agents' of the respondent within the meaning of the section." 356 U.S. at 328.

[22] 356 U.S. at 331 n. 5.

plied in determining which of two parties is a given individual's employer at a given moment.

We have carefully considered the appellant's other charges of error committed upon the trial and of abuse of discretion in transferring venue, but we find no error nor anything which merits discussion in addition to what we have already said.

The judgment is Affirmed.

RIVES, CIRCUIT JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the ruling on the motion to dismiss the appeal and in that part of the opinion relating to said motion. I think, however, that the appellant was an employee of the Railroad, and that, in the maintenance and repair of the spur track or side track, the turpentine company was the "agent" of the Railroad within the meaning of the Federal Employers' Liability Act.[1]

Appellant was in the general employ of the Railroad. The services which he was performing at the time of his injury [fol. 469] benefited the railroad as well as the turpentine company. In my opinion, the appellant did not cease to be a Railroad employee when he accepted work on the siding used in the operation of the Railroad. In the maintenance and repair of the siding, I think that the turpentine company was as truly the "agent" of the Railroad within the meaning of the Federal Employers' Liability Act as the Belt Railway was the "agent" of the Missouri-Pacific in switching the latter's car in *Sinkler* v. *Missouri-Pacific R. Co.*, 1958, 356 U.S. 326, 330.

In *Robinson* v. *Baltimore & Ohio R. Co.*, 1915, 237 U.S. 84, 92, it was recognized that the contract by which liability was imposed solely on the Pullman Company would be invalid under Section 5 of the Act, now 45 U.S.C.A. § 55, if the employee of the Pullman Company were also the employee of the railroad company. Conceding arguendo that the appellant was the employee of the turpentine company, I think that he was also the employee of the Railroad Com-

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[1] I do not mean to intimate that the cost of such maintenance and repair could not by contract be imposed on the turpentine company. That question is not before us.

pany. Further, the Pullman Company in that case and the connecting railroad in *Linstead* v. *Chesapeake & Ohio Ry.*, 1928, 276 U.S. 28, were not considered as "agents" of the defendant railroad, as I think the turpentine company should be under the meaning of "agent" developed in the *Sinkler* case, *supra*.

I therefore concur in part and dissent in part.

[fol. 470] CAMERON, Circuit Judge, Concurring:

I concur in the affirmance of the judgment of the district court and in all which was so ably said by Judge Tuttle in concluding that the court below did not commit error in entering final judgment on the merits against appellant and in favor of appellee.

I am not in accord with the portion of the opinion which holds that the appeal was timely. Since the judgment affirmed is a final disposition of the case, I think that the ruling with respect to the appeal is of no practical moment, and have noted my views thereon only to avoid the inference that I would be bound by what is said in the opinion concerning the timeliness of the appeal.

[fols. 471-472] JUDGMENT—Entered March 12, 1959

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,
OCTOBER TERM, 1958

No. 17,166

D. C. Docket No. 269 Gainesville Civil

RAYMOND P. WARD, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, Appellee

Appeal from the United States District Court for the Northern District of Florida

Before Rives, Tuttle and Cameron, Circuit Judges.

JUDGMENT—April 9, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Raymond P. Ward, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Concurring in part and dissenting in part"

March 12, 1959.

Issued: April 9, 1959.

[fol. 473] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 474] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1959

No. 76 Misc.

RAYMOND P. WARD, Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 19, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 485 and placed on the summary calendar.

October 19, 1959.

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FILED
JUL 18. 1960

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 485 Miscellaneous

RAYMOND P. WARD,
Petitioner,

—*v.*—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 195....

No. 967 Miscellaneous

RAYMOND P. WARD,
Petitioner,

—*v.*—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

Raymond P. Ward, Appellant v. *Atlantic Coast Line Railroad Company, Appellee,* 265 F. 2d 75 (CA 5, 1959), attached hereto as Appendix "A".

II

JURISDICTION

The jurisdiction of this court is not denied. However, it is respectfully submitted that there are not sufficient reasons to warrant consideration of Petition for Writ of Certiorari under Rule 19 of the Revised Rules of this Court.

III

QUESTION PRESENTED

The real issue here presented is whether, as a matter of law, Petitioner was Respondent's employee at the time of the injury, notwithstanding at that time Petitioner was working on his "day off", on a privately owned sidetrack, by voluntary agreement with the private owner, by whom he was paid for such service.

IV

SUMMARY OF ARGUMENT

It is Respondent's contention that the petition should be denied because:

1. No reason is shown to justify this Court in granting Certiorari.

2. Whether the Petitioner was an employee of the Respondent at the time of injury is a question of fact which the jury in the Trial Court resolved in favor of Respondent under a correct charge by the Trial Court, which finding was affirmed by the Court of Appeals for the Fifth Circuit, reported in 265 F. 2d 75.

V

SUMMARY OF FACTS

It is undisputed that the injury occurred while Petitioner, together with several other men familiar with railroad work, on his regular Saturday "day off" from his duties for the Respondent by whom he was usually employed, was making repairs to a private sidetrack owned by the M & M

Turpentine Company, which connects with Respondent's main line near Chiefland, Levy County, Florida, locally known and here referred to as the McKenzie siding. It is further undisputed that all of the men were paid by the Turpentine Company.

While it was stipulated that the McKenzie siding was used by "non-owner" shippers for loading watermelons and other produce shipments in interstate commerce, it was uncontroverted that before Respondent would furnish cars on the siding each shipper was required to obtain express permission for such use from the Turpentine Company, which had exclusive control of the siding.

It was further stipulated that the McKenzie siding was on private property and owned by the Turpentine Company, and the evidence stands uncontroverted that Petitioner knew this, that Petitioner and the other men were paid for making repairs to the sidetrack by the Turpentine Company which had the right to start and stop the work, and that Respondent had no legal obligation to maintain the sidetrack.

The evidence was conflicting as to whether or not Petitioner was told before he commenced working on the McKenzie siding that he would not be working for the Respondent during that time. However, the jury resolved that issue in favor of Respondent.

VI

ARGUMENT

1. NO REASON IS SHOWN TO JUSTIFY THIS COURT IN GRANTING CERTIORARI.

The Petitioner contends that there is a conflict between the instant case and the case of *Erie RR. v. Margue*, 23 F. 2d

664 (CA 6, 1928), which conflict should be resolved by this Court. Actually, no conflict exists. The factual situations are materially different. In the *Margue* case there was actually a contract between the Railroad Company and the Construction Company whereby the Construction Company agreed to repair facilities *of the Railroad Company vital to the operation of the Railroad,* which work could not be delegated. In the instant case there is no non-delegable duty involved. The sidetrack was not owned by Respondent and it was not vital to the operation of the Railroad. It was the Turpentine Company's duty to maintain the sidetrack and the manner of maintenance was left wholly to its discretion. The only contract material to this cause of action was the one between the Turpentine Company and the men who repaired it. The Respondent had no control over the Turpentine Company in the selection of the men who repaired the track nor did it have any control over the manner in which they performed the work.

Petitioner also cites *Sinkler v. Missouri Pacific RR. Co.,* 356 U.S. 326, 2 L. ed 2d 799 (1958). The *Sinkler* case is readily distinguishable on the facts. There the employee of the Railroad was injured during the performance of his ordinary duties with the Railroad Company whereas, as we have shown above, that is not the case here.

The rationale of the majority opinion finding that agency existed in the *Sinkler* case was based on the fact that the injury occurred during and as a result of a vital operational activity of the Railroad, 2 L. ed 2d 799, 804:

> "* * * We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, *operational activities of the employer* such others are 'agents' of the employer within the meaning of Section 1 of FELA." (Emphasis supplied.)

In our case, no operational activtities of the Respondent were being carried out.

It should also be noted that there is a strong dissenting opinion in the *Sinkler* case by Mr. Justice Harlan, concurred in by Mr. Justice Frankfurter, in which it is pointed out that further expansion of the FELA by the Courts will convert it into a Workman's Compensation Act.

A recent decision by the Court of Appeals for the Third Circuit, *Byrne v. Pennsylvania Railroad Company,* 262 F. 2d 906 (CA 3, 1958), Cert. denied, 3 L. ed 2d 766 (1959), involved an employee of Westinghouse killed while performing a duty for the Railroad Company. That case is distinguishable from the one at bar in that the deceased was engaged in repairing locomotives of the Railroad in furtherance of his duties and on occasions rode such locomotives. He was also subject to call at any time by the Railroad. The question of employment was submitted to a jury in the Court below and the issue was resolved against the Railroad. In our case, the issue of employment was likewise submitted to a jury and was resolved in Respondent's favor.

It is therefore apparent that this case does not present sufficient reason to grant Certiorari as it does not involve any of the pertinent questions enumerated in Rule 19 of the Revised Rules of this Court. *United States v. Rimer,* 220 U.S. 547, 55 L. ed 578 (1911); *Magnum Import Co. v. De Spoturno Coty,* 262 U.S. 159, 67 L. ed. 922, 924 (1923).

As the members of this Court have frequently stated it is not the province of this Court to review cases between private litigants and to substitute its own judgment for that of a jury who heard the witnesses and observed their demeanor on the stand, or for that of the Trial Court or the Court of

Appeals, unless some great public question is involved. That exception does not apply in this instance.

2. WHETHER THE PETITIONER WAS AN EMPLOYEE OF THE RESPONDENT AT THE TIME OF INJURY IS A QUESTION OF FACT WHICH THE JURY RESOLVED IN FAVOR OF RESPONDENT UNDER A CORRECT CHARGE BY THE TRIAL COURT, WHICH FINDING WAS AFFIRMED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

According to the Federal Court decisions construing the FELA, Respondent can incur no liability for Petitioner's injury unless an "employer-employee" relationship existed. See *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U.S. 84, 59 L. ed. 849 (1915); *Chicago, Rock Island & Pacific Railway Co. v. Bond*, 240 U.S. 449, 60 L. ed 735 (1916). It was also held in the *Robinson* case that the terms "employed" and "employee" under the FELA are used in their usual and natural sense, importing the conventional relation of employer and employee. This being true, it would follow that under the existing facts which are not controverted in our case, the question of whether Petitioner was Respondent's employee was for the jury to decide.

In *Baker v. Texas and Pacific Railway Co.*, 79 Sup. Ct. 664, 3 L. ed. 2d 756 (1959), this Court held that whether an injured person is an employee of a railroad for the purpose of the FELA is a question of fact for the jury under appropriate instructions as to the various relevant factors under law, and the question may be taken from the jury only if reasonable men could not reach differing conclusions.

In the instant case the question was properly presented to the jury.

The *Baker* case is cited by Petitioner in support of its contention that the jury in our case was improperly instructed and that it therefore conflicts with our case. However, the case can be readily distinguished. *Baker* involved another instance where the *Railroad* contracted with an independent contractor to perform an essential railroad function. To reiterate, in our case the only contract between Respondent and the Turpentine Company dealt with the sidetrack which was located on the Turpentine Company's land. The contract of employment in the particular instance was between Petitioner and the *Turpentine Company* and there was no delegation of a non-delegable duty.

The contention of the Petitioner that the jury was not properly instructed is without merit. The facts were uncontroverted that Petitioner was paid by the Turpentine Company and the jury was allowed to pass on whether Petitioner had been advised and knew that he was not working for the Respondent. See Trial Court's Instructions, Appendix "B". These instructions, if anything, were prejudicial to Respondent since they placed the burden on it to show that Petitioner knew that he was not performing work for the Railroad.

The Court of Appeals, in our case, had this to say regarding the Trial Court's charge to the jury:

> "If the charge erred, it erred in appellant's favor, for when the court charged 'that the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad' it resolved all the circumstantial evidence, such as the right to control the crew's work, in favor of appellant, although the evidence was subject to varying inferences and might have been resolved differently by the jury. The only question

which the court did not resolve in appellant's favor was the question whether the parties had made an *agreement* that appellant would work for appellee or an *agreement* that he would work for McKenzie." (Appendix 'A', P. 11).

CONCLUSION

There are no "special and important" reasons for granting Certiorari. Neither are there any conflicts in the decisions. The case, as found by the Circuit Court of Appeals for the Fifth Circuit, was correctly presented to the jury which found in Respondent's favor.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17166

RAYMOND P. WARD, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(March 12, 1959.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal by the plaintiff from a judgment following a jury's verdict for the defendant in an action under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-60, for damages for personal injuries allegedly caused by the negligence of his alleged employer, the railroad defendant.

Before we can consider the merits of the appeal we must pass upon appellee's motion to dismiss for failure to file timely notice of appeal.

Judgment was entered against appellant in the United States district court in Gainesville, Florida, on December 5, 1957. According to appellant's uncontroverted affidavits, appellant's counsel in Miami, Florida, mailed a notice

of appeal by air mail to the clerk of the district court in Gainesville, depositing it in a United States mail depository at about 5:00 P.M. on January 2, 1958. The clerk's office in Gainesville has only one employee, the deputy clerk. She was absent from the office on annual leave on January 2 and 3, 1958, and the office was therefore not open on those days. The office was also closed the following day, Saturday, January 4, 1958. It had been regularly closed on Saturdays since February 13, 1956, due to the fact that in order to keep the office open six days a week with only one employee it would have been necessary for her to work more than the forty hours of a federal employee's regular work-week.

Since no one was there to open the mail until Monday, January 6, appellant's notice of appeal was not marked as received and filed by the clerk's office until that date, which was one day after the time for filing notice of appeal had expired.[1]

Appellant's affidavits assert that the notice should, in the ordinary course of air mail delivery, have arrived at the post office in Gainesville on Friday morning, January 3, and if so it would have been received in the clerk's office, located in the post office (or received in the post office box which appellant states is maintained by the clerk), during regular business hours on January 3 if the office had been open as

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[1] The applicable statute reads in part:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C.A. §2107.

The applicable rule of procedure reads in part:

"When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . . .

"A party may appeal from a judgment by filing with the district court a notice of appeal . . . ." F.R.C.P. 73.

required by F.R.C.P. 77(c).[2] His affidavits further assert that if, contrary to the best recollection of the clerk who mailed it, the notice was sent by regular mail rather than by air mail, then the notice of appeal would have been received during business hours on Saturday, January 4. Appellant contends that Rule 77 (c) required the Gainesville office to be open on Saturday mornings, which were regular business hours in that community; and that appellant's counsel had a right to assume that the clerk was complying with this requirement.

Accepting these uncontroverted facts as true, we conclude that appellant is entitled to the presumption that his notice of appeal was placed in the post office box of the clerk of the district court within the required time, notwithstanding the failure of the clerk or his deptuy manually to take possession of and mark the notice "filed" until Monday, January 6, 1958. Being in the custody of the clerk, it met the requirement[3] that it be "actually" received in the clerk's office within the thirty-day period.

In so ruling we do not depart from the well-established principle that the jurisdictional[4] requirement that notice be filed within thirty days is not met by deposit of notice in the mail in time for it to reach the clerk's office in the usual course of mail delivery within the time allowed.[5] The distinction here is that the failure to mark the notice "filed" can be attributed to the absence of the clerk, whereas in the usual

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2 The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays . . . ." F.R.C.P. 77(c).

3 Casalduc v. Diaz, 1 Cir., 117 F. 2d 915.

4 Knowles v. United States, 5 Cir., 260 F. 2d 852, 854; Marten v. Hess, 6 Cir., 176 F. 2d 834.

5 See Poyner v. Commissioner, 5 Cir., 81 F. 2d 521; cf. Lejeune v. Midwestern Ins. Co. of Oklahoma City, Okla., 5 Cir., 197 F. 2d 149.

case such failure is taken to indicate that it was not actually in the custody of the clerk.

Nor do we pass upon the correctness of the rule applied in *Casalduc v. Diaz*, 1 Cir., 117 F. 2d 915, cited by appellee. In that case the appellant's counsel swore that he had slipped a notice of appeal under the clerk's door after business hours. The court held that the notice had not been placed in the actual custody of the clerk by this action and therefore it had not been filed according to law. The court clearly believed that the attempted filing had taken place *after business hours* on the last day of the legal period. Under such circumstances, it stated that the proper procedure for counsel to follow was to seek out the clerk or deputy clerk and to deliver the notice to him personally. We are not presented with such circumstances here. We have concluded that the notice was placed in the clerk's post office box during regular business hours on a day of the week when the clerk's office was regularly open for business. We see no reason to require counsel in another city to take affirmative steps to learn whether anyone was in the office during such hours and if no one was in the office, to seek out the clerk or his deputy.

We hold nothing more than this: It is the time when the clerk receives actual custody of the notice which determines whether this court has jurisdiction over the appeal,[6] and under circumstances such as are present in this case, the notice may be received in the clerk's custody and control even though it has not yet been manually handled and marked "filed" by the clerk or his deputy.

We turn to a consideration of the merits of this appeal.

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[6] See Silverton v. Valley Transit Cement Co., 9 Cir., 237 F. 2d 143.

The trial below produced conflicts in the evidence relating to several major issues, but only one of these issues is argued on appeal. This is the issue as to whether appellant was working as appellee's employee when his injury allegedly occurred. He was allegedly injured while working on a privately owned siding which was connected with appellee's tracks. The siding was built by the defendant railroad for the primary use, and at the expense, of a turpentine company which owned the land on which it lay, but during the season when watermelons were harvested in that neighborhood the siding was also, by permission of the owner, used to load cars with watermelons, which would be shipped on appellee's tracks. It was stipulated by the parties that the siding was used in interstate commerce.

The turpentine company had agreed with the railroad that it, the turpentine company, would maintain and repair the side tracks so as to conform to the railroad's maintenance and safety specifications. Appellee's track foreman in charge of the section of appellee's track which connected with the turpentine company's siding was, according to appellee's rule book, responsible "for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds" within this section. However, he testified that his duty with respect to private tracks was limited to inspection and did not include the duty of maintenance which he had with respect to the railroad's own tracks. This was reiterated by the testimony of the superintendent of the local district of the Atlantic Coast Line Railroad.

The foreman, I. H. Keene, inspected the siding shortly before the day of the accident here involved and he found that the track needed repair. He informed the turpentine com-

pany's president, D. P. McKenzie, about these findings, and as was customary, McKenzie asked Keene if he would see that the tracks were fixed so as to meet the railroad's regulations. Keene agreed to do this, and on Friday, May 21, 1954, after his repair crew had finished its regular, five-day, forty-hour work-week, he asked the crew, which included appellant as its apprentice foreman, if it would like to repair the McKenzie siding the following day, for which it would be paid at overtime rates. The crew agreed to do it, and the next day, Saturday, the men reported to work at the railroad's tool shed at their usual reporting time, took their regular railroad tools, and proceeded to the McKenzie siding, where they began replacing some defective ties. McKenzie was present when the men arrived at the job site, but he left soon thereafter and the work was carried out under foreman Keene's direction. In the course of this work, appellant allegedly received the injury which is the subject of this action.

Pointing to these facts, appellant says the injury occurred in the course of his employment by appellee and he asserts that appellant cannot avoid liability for it by means of any arrangement with McKenzie governing maintenance of the siding. Appellee contends, on the other hand, that the rest of the facts of the case support a finding that appellant was working for McKenzie and not for appellee.

The facts relied upon by appellee include the following: It was admitted that this siding was owned by the turpentine company, not by appellee. It was stated without contradiction by the witness Keene that he had no duty to keep privately owned sidings in repair.[7] Appellee's other witnesses testified that the railroad company itself had no such duty.

[7] The only evidence which came close to contradicting this was the aforementioned rule book and appellant's testimony that Keene had informed him that the roadmaster had "told him [that the crew] had to repair this particular siding."

Keene testified that he and his crew had repaired private tracks on numerous occasions and that they had never done it on a regular work day; it had always been on Saturday, their day off. Appellee's witnesses admitted that appellee's management knew of this practice whereby the railroad's employees, using the railroad's tools, repaired privately-owned sidings on their day off; but they testified that no one connected with appellee's management had ordered Keene to make these repairs.

Keene testified, and it may be taken as true, that the crews regular Atlantic Coast Line wages were paid twice monthly by Atlantic Coast Line checks, but when it worked on private tracks on Saturdays the men were paid at the end of each day's work—either in cash or by a check drawn on the account of the owner of the tracks. That is what occurred on this occasion.

Keene also testified, and his testimony was supported by the testimony of the two other members of the crew who testified, that when he told the crew about the McKenzie job he merely offered them a chance to earn some extra money on their day off and did not order them to work. He testified that if the men did not choose to work on these jobs, this would not affect their standing with the railroad in any way. Keene and the two laborers testified that the crew, including appellant, *voluntarily* agreed to work and *voluntarily* agreed on the time they would report to work. Keene and one of the laborers testified that when the men reported on Saturday he warned them that they would be working for McKenzie and not for the railroad and therefore they should be careful to avoid any accidents. Keene testified that he thought he had also told them this on Friday, but he was not certain. He said he had definitely told appellant on prev-

ious occasions that he would be working for someone other than the railroad.

All of the testimony on this last point was contradicted by appellant. He testified that on Friday, May 21, 1954, Keene told the crew to report for work on Saturday at the regular time to repair the McKenzie siding; that Keene had told him that Mr. Sanders, appellee's roadmaster, had told Keene to repair the siding; that he was never told he was working for McKenzie; and that he believed he was working for appellee that Saturday.

With the evidence in this posture, the trial court charged the jury that appellant was working on the siding as appellee's employee unless he had been told beforehand that he would be working for a third party and he had accepted the job with this knowledge. The court instructed the jury that if they found that he had known this when he went out to work that Saturday he could not recover.[8] The jury awarded a general verdict of no recovery and judgment was entered thereon.

Appellant's arguments are directed at the court's charge to the jury. First, he says the court erred in refusing to charge that, as a matter of law, appellant was employed by the railroad at the time he was allegedly injured. Alternatively, he argues that the court erred in refusing to charge the jury concerning "the usual and standard legal criteria for determining the employer-employee relationship"—that is, the locus of the power to control the employee and to dismiss him, the source of his wages, and so forth.

In passing upon appellant's contentions we start from the premises, first, that the appellee could incur no liability

[8] The railroad was the only party named as a defendant in this suit.

under the F.E.L.A. for appellant's injury unless there existed an employer-employee relationship between the parties at the time of the accident, *Robinson v. Baltimore & O.R.R.*, 237 U.S. 84; *Chicago, Rock Island & Pac. Ry. v. Bond*, 240 U.S. 449, and second, that the terms "employee" and "employed" in the F.E.L.A.[9] are used in their usual and natural sense, importing the conventional relation of employer and employee. *Robinson v. Baltimore & O.R.R.*, 237 U.S. 84, 94.

It is a fundamental principle of law that the relation of employer and employee is a relation created by contract, either express or implied. *New Amsterdam Cas. Co. v. Soileau*, 5 Cir., 167 F. 2d 767; *Fleming v. A. H. Belo Corp.*, 5 Cir., 121 F. 2d 207, aff'd, 316 U.S. 624. If appellant failed to prove that he had a contract of employment with appellee covering this Saturday labor, then he cannot recover damages from appellee in this action.

The possibility that appellant could have been repairing the McKenzie siding under an express contract with appellee is easily dismissed, for as the foregoing recital of facts demonstrates, the evidence permitted the jury to find that Keene had told appellant, and appellant believed, that he was working for McKenzie, not for the railroad. Although appellant argues that by virtue of its charge to the jury the court erroneously held as a matter of law that appellant was not working for the railroad and permitted the jury to consider only the question of whether he *knew* it, a reading of the complete charge on this issue makes it clear that the court did not. It carefully charged the jury that the "Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a

[9] 45 U.S.C.A. §51.

private track to make some extra money." In other words, the court reduced the issue of employment to the narrow question of whether "he was . . . advised ['that he was working for some third person and not the Railroad'] before he went out there to work, and he went out on his own volition and joined the others to make some extra money."[10]

The cases cited by appellant to show that the court should have charged the jury that the question of employment should be resolved by weighing "the usual and standard legal criteria for determining the employer-employee relationship" are all distinguishable from, and inapplicable, to the present litigation. One group[11] of these cases involve the "borrowed servant" situation wherein an employee is loaned by his general employer to another employer and there is no direct proof that the employee had actual knowledge of, or gave his

10 The pertinent portions of the court's charge concerning the employment issue were as follows:

"That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?

MR. RUTLEDGE: Your Honor, to make it clear he was working for some third person and not working for the Railroad.

THE COURT: Yes, sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have to worry about all the other problems. You will retire and consider your verdict."

11 Linstead v. Chesapeake & O. Ry., 276 U.S. 28; Geraghty v. Lehigh Valley R.R., 2 Cir., 70 F. 2d 300; Halderman v. Pennsylvania R.R., 2 Cir., 53 F. 2d 365; Woodward Iron Co. v. Limbaugh, 5 Cir., 276 Fed. 1; The Slingsby, 2 Cir., 120 Fed. 748.

consent to, a change in employment, and it is thus necessary to weigh all of these "usual and standard legal criteria" to determine whether the employee has in fact changed employers. We hold that the lower court correctly ruled, in effect, that even if all the indirect evidence—i.e., right to control, source of wages, etc.—tended to show that appellant was acting in appellee's employ at the time of his injury, the jury should nevertheless find that he was not so employed if they found from other evidence that he had *agreed* to work that Saturday *for McKenzie* or (what amounts to the same thing) he understood that his regular employer *refused* to extend its contract of employment to cover this work.

If the charge erred, it erred in appellant's favor, for when the court charged "that the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad" it resolved all the circumstantial evidence, such as the right to control the crew's work, in favor of appellant, although the evidence was subject to varying inferences and might have been resolved differently by the jury. The only question which the court did not resolve in appellant's favor was the question whether the parties had made an *agreement* that appellant would work for appellee or an *agreement* that he would work for McKenzie.[12]

The second group of cases[13] cited by appellant to support his contention that the court should have submitted these criteria to the jury involve a question which is related to but not the same as the loaned servant doctrine just discussed.

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12 Depending on whose version of the facts was correct, Keene was authorized either by Atlantic Coast Line or by M. and M. Turpentine to make an offer to a contract of employment.

13 Dougall v. Spokane, P. & S. Ry., 9 Cir., 207 F. 2d 843; Pennsylvania R.R. v. Barlion, 6 Cir., 172 F. 2d 710; Cimorelli v. New York Cent., 6 Cir., 148 F. 2d 575.

They are concerned with whether the employee of an alleged independent contractor is to be considered as an employee of the railroad which contracted for the services of the independent contractor, so as to permit the employee to sue the railroad under the F.E.L.A. Here too the courts discussed the criteria presented here by appellant, but in none of these cases were the courts dealing with an employee who had been expressly told beforehand that he would not be working for the railroad. In none of them, therefore, was there an issue as to whether the parties had expressly negated the existence of the legal relation which the circumstantial evidence established as a matter of fact or of legal construction. Thus it was proper there, but improper here, for the issue to be decided by the application of these legal criteria to the circumstantial evidence of employment.

Consideration of this last group of cases brings us to the question whether, despite the expressly manifested intent of the parties not to enter into a relation of employer and employee, they have, by their conduct, unwittingly (or even unwillingly) entered into such a relation.[14] This is the question raised by appellant's other major contention: that he was covered by the F.E.L.A. as a matter of law.

Appellant's theory is that the McKenzie siding and the maintenance thereof were part of appellee's "total enter-

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[14] Cf. Atlantic Coast Line Railroad v. Treadway, 120 Va. 735, 92 S.E. 560 (1917), cert. denied, 245 U.S. 670, where the Virginia court observed:

> "The word 'employer' and more especially the word 'employee,' considered apart from their text in the federal act [F.E.L.A.], are ambiguous in their meaning. They may be limited in meaning by the idea that an express contract of hiring by the carrier of and the payment of wages by the latter to the employee are essential to bring him within the provisions of the act. Or they may have a broader meaning and include as employees all who are engaged in the discharge of duties of servants of the carrier, whose service is knowingly accepted by the latter."

prise"[15] and the arrangement between McKenzie and appellee concerning the maintenance of the siding was simply an illegal device to avoid liability under the F.E.L.A.

It should be obvious at the outset that the statutory provision[16] against devices to avoid the employer's liability cannot be used to prove the existence of the legal situation—the employer-employee relationship—which calls into play both the statute creating this liability and the provision thereof which forbids any devices intended to avoid such liability. In *Robinson v. Baltimore & O. R.R.*, 237 U.S. 84, the Supreme Count construed a Pullman Company employee's contract of employment which released from liability all railroad companies over whose tracks he might travel in the course of his service for Pullman. He contended that the contract was rendered illegal and void by the predecessor of the provision relied upon by appellant. The court stated, 237 U.S. at 91:

> "The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employes' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the Railroad Company within the meaning of the Act."

When we examined the cases cited by appellant we find that none of them applies to the set of facts with which we are dealing. *Atlantic Coast Line R.R. v. Meeks*, Tenn. App., 208 S.W. 2d 355, cert. denied, 333 U.S. 327, and *Virginia*

15 Sinkler v. Missouri Pac. R.R., 256 U.S. 326, 331.

16 "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C.A. §55.

Ry. v. Early, 4 Cir., 130 F. 2d 548, both involved injuries to employees who were engaged in activities "necessarily incident" to actual service for the railroad. In the one case the employee was resting in a shanty car provided by the railroad for a repair gang which was "on call" by the railroad at all times, and in the other case the injured employee was on the railroad's property returning from a company-maintained lunchroom to the machine shop where he worked for the railroad. We think it clear that the court below could not have ruled as a matter of law that appellant's voluntary work on this privately-owned siding on his regular day-off was a "necessary incident" of his regular employment. Even if it be conceded, *arguendo,* that the doctrine was applicable at all, the court would have been obliged by the evidence, including testimony that appellant's position with appellee would not have been jeopardized if he had declined to do this extra work, to submit the question to the jury, as the court did in *Atlantic Coast Line R.R. v. Meeks, supra.*

Chicago, R.I. & G. Ry. v. Trout, Tex. Civ. App., 224 S.W. 472, and *Terminal R. Ass'n of St. Louis v. Fitzjohn,* 8 Cir., 165 F. 2d 473, involved the loaned servant situation discussed earlier in this opinion. Neither of the plaintiffs in these cases consented to a change of employers,[17] whereas, as we have seen, there was a clear jury question as to whether appellant Ward consented to work for someone other than the Atlantic Coast Line, his regular employer.

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[17] In the Fitzjohn case the plaintiff's testimony that he had never been advised of nor consented to a change in employment was uncontradicted, 165 F. 2d at 476, and the other evidence on this point was all in his favor. Therefore the trial court was able to rule as a matter of law that the plaintiff was still in the employ of his regular employer. In the Trout case it was the railroad which contended that the question of employment should be decided as a matter of law. The appellate court held that the evidence was sufficient to submit the question of the employee's consent to the jury, 224 S.W. 474, and the jury verdict in favor of the employee was allowed to stand.

Erie R.R. v. Margue, 6 Cir., 23 F. 2d 664, also cited in support of appellant's contention that he was covered as a matter of law, is in some ways closer to the present case, but there are legal differences between the two situations and these demand different legal conclusions. The Margue case involved a contract by which the defendant railroad employed a construction company to maintain the railroad's tracks, roadways and structures, using its own employees. The railroad company agreed to furnish without charge, the tools, camp cars, laborers' quarters, train equipment, work train service, and telegraph service needed for the work, to carry the necessary supplies over its lines, to pay for the labor and material used in the work, and to pay the construction company for its services five per cent of the cost of such labor and materials. The construction company agreed to comply with the workmen's compensation laws of the state in which it was operating, and the railroad agreed to reimburse it for all expenses incurred under these laws. The court held that an employee of the construction company was an employee of the railroad and that this contract was inoperative to insulate the railroad from liability, because Section 5 of F.E.-L.A. nullifies all contracts intended to exempt carriers from their liability under the Act.

The court distinguished the decisions of the Supreme Court which had held that the claimants involved therein were not employees of the defendant railroads, but rather of independent contractors.[18] The court drew the following significant distinction:

> "It might well be argued that the duty of a railroad company to maintain its right of way, over which it and it alone operates its trains, cannot be delegated to

[18] Wells Fargo Co. v. Taylor, 254 U.S. 175; Chicago, R.I. & Pac. R.R. v. Bond, 240 U.S. 449; Robinson v. B. & O. R.R., 237 U.S. 85.

another, so as to relieve the company of any part of its responsibility therefor—certainly, not as to the public which it serves, and perhaps not as to those who work upon its tracks. Whether that be so or not, that responsibility is quite a different thing from the services involved in the cases referred to—the loading or unloading of cars with coal at a terminus, or the performance of a special service, such as express and sleeping car companies perform, *and which the railroad is not legally bound to perform. The maintenance of defendant's railroad tracks was essential to the exercise of its franchise* . . . ." (Emphasis added).

This distinction is also of manifest importance in the appeal before us. Unless appellant has proved that the duty to maintain this privately-owned track has been assumed by, or was imposed by law on, the Atlantic Coast Line, then the question is not whether the railroad *could legally* insulate itself from its liability as employer of the maintenance crews by agreeing with the owner that he would bear this responsibility; the question is simply whether or not appellee did in fact do this.

When the railroad learned that the turpentine company wished to have a railroad siding, there was presumably a variety of arrangements whereby it could have satisfied the turpentine company's wishes. We may assume that some of these alternatives would have imposed the duty of maintenance on the railroad. However, the railroad chose to avoid this responsibility. It built the siding at the turpentine company's expense and had the turpentine company assume the responsibility of maintaining this siding—which it would own—in conformity with appellant's safety standards in order to make it possible for the railroad to send its cars

upon this siding. At this juncture it was still possible for the railroad to assume the responsibility; for in discharge of its duty of repair and maintenance the turpentine company might either hire its own employees or it might ask the railroad to direct the latter's employees to do the necessary work. In the one case the railroad would be responsible for the employees' safety; in the other case the responsibility would rest upon the turpentine company.

Appellee contends that it managed to avoid the first alternative. Appellee's witnesses testified that the railroad had no duty to maintain this siding; that foreman Keene was requested by the president of the turpentine company and not by any railroad officer or employee to repair these tracks; and that the workers were all told they would be working for a third party and not for the railroad. It is undisputed that the third party paid the men's wages. Against this testimony which tends to show that the railroad never did assume the duty of maintenance, appellant is able to point to the railroad's book of operating rules and the circumstantial evidence—the customary use of appellee's employees and tools, etc.—which tended to show that as a matter of actual practice, the railroad did assume the duty.

As for the rule book, the jury was entitled to believe appellee's witnesses who said that the rule making the section foreman responsible "for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds" within his section actually obligated him merely to inspect the private tracks and to report defects to their owners. The effect of all the circumstantial evidence has been discussed earlier in this opinion, and at this point we need only state virtually the same thing we stated there—that in effect the court's charge interpreted

these facts as establishing that if the railroad had not expressly manifested its intent to the contrary, then it had assumed the duty of caring for the McKenzie siding and had employed appellant for the purpose of performing that duty.

We come, finally, to a consideration of the possibility that there was a duty imposed on appellee by law, regardless of its consent, to maintain these private sidings, and that either (1) this duty could not be delegated to independent contractors—not even the owners of the sidings—or (2) that if it did delegate it to a third party, the employees of that other party would nevertheless be employees of appellee.

Appellant has cited no decisions extending a railroad's responsibility as far as this; nor have we found any in our own research. In *Erie R.R. v. Margue, supra,* the duty to maintain the tracks arose out of the fact that "the maintenance of [the] defendant's tracks was essential to the exercise of its franchise rights." 23 F. 2d at 665. However, we do not understand that every private siding upon which it sends its cars primarily for the use and benefit of the siding's owner is part of the railroad's franchise or that because of this the railroad is bound to keep it in repair. Nevertheless, even if there were somehow a duty on the railroad to maintain this trackage "in the exercise of its franchise rights," it is not certain that this duty would be nondelegable in the same way that the duty to maintain the railroad's main right of way would or might be. Compare *Erie R.R. v. Margue, supra,* with *Dougall v. Spokane, P. & S. Ry.,* 9 Cir., 207 F. 2d 843. However, we need not attempt to resolve this question here, since we are only dealing with a privately-owned siding on private property.

When we examine the cases decided by the Supreme Court we find that it has recognized the right of a carrier

to avoid liability under the Act by delegating to independent contractors various functions which appear to be more integrally a part of the carrier's franchise or its general operations than the one with which we are presently dealing. *Robinson v. Baltimore & O. R.R.*, 237 U. S. 84, upheld a contract of employment which made a porter in charge of a Pullman car an employee of the Pullman Company and not of the railroad. In *Chicago, R.I. & Pac. Ry. v. Bond*, 240 U.S. 449, the Court recognized the right of a railroad to delegate the job of unloading and loading coal on the carriers locomotives at one of its terminals to an independent contractor. It was held that the contractor was not an employee of the railroad and therefore he was denied the benefits of the F.E.L.A. Cf. also *Wells Fargo & Co. v. Taylor*, 254 U.S. 175. Similarly, in the present case, we hold that Atlantic Coast Line was not restrained by law from declining the responsibility of maintaining the McKenzie siding.

It is appellant's contention, however, that the maintenance of this siding was, in accordance with the recent decision in *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, a part of appellee's "total enterprise," and therefore he was an employee of appellee while he was participating in this aspect of the "common endeavor." In the Sinkler case the plaintiff was employed as a cook in the private car of the defendant railroad's general manager. He was at work in the car when a switching crew, employed by another railroad, undertook to switch the car from one track to another in the Union Station at Houston, Texas, and negligently jolted the car, injuring the plaintiff. The function of switching cars in the Houston area had been contracted to this other railroad by the defendant and all other carriers operating in that area. The question to be decided was whether the defendant was liable for the negligence of employees of this independent

contractor. Interpreting Section 1 of the F.E.L.A., which makes carriers liable to their employees for injuries resulting from the negligence "of any of the officers, agents, or employees of such carriers,"[19] a majority of the Court were of the opinion that the members of the switching crews were the defendant's "agents," and two Justices felt that they were performing nondelegable duties of the defendant railroad. The railroad was consequently held responsible for the injuries they negligently caused.

In passing upon the relevance of that decision to this case we must take into account the distinction which the Supreme Court made in reaching it. First, the majority opinion made repeated references to the fact that the function which the independent contractor was performing was a "vital operational activity"[20] of the defendant's enterprise. The activity—the switching of all of the defendant's cars used in its regular operations in the Houston area—was a necessary and indispensable part of the defendant's regular operations; which contrasts with the incidental part which the turpentine company's private siding played in appellee's operations.

We need not rely upon this distinction, however, nor need we inquire whether a controlling distinction lies in the fact that, as the Supreme Court noted, the Sinkler case fell within the ambit of the common law doctrine that a carrier could not avoid its liability of respondant superior by delegating to independent contractors its *operational activities,* or in the fact that Sinkler involved the issue of whether the negligent party was sufficiently closely connected to the carrier to incur liability whereas this case involves the question whether the injured party was so connected. It is sufficient to note

19 45 U.S.C.A. §51.
20 356 U.S. at 327, 328-29, 331.

that the majority of the Court expressly refrained from making any implication that the statutory terms "agents" and "employees" were coextensive or that the members of the crew employed by this independent third party were *employees* of the railroad. It limited its decision to the holding that they were *"agents,"* within the majority's broad interpretation of that statutory term.[21] In so deciding, the Court apparently conceded the continuing validity of the rule of *Robinson v. Baltimore & O. R.R., supra,* denying coverage to employees of carriers' independent contractors; for it distinquished that issue from the issue before it in the Sinkler case, without manifesting any inclination to discredit or disapprove of its decisions which disposed of the former issue adversely to employees.[22]

We therefore conclude that the Sinkler decision does not warrant an abandonment of the conclusion, which we reach on principle and authority, that either there was no duty on appellee to care for this private siding or if there was, it was a duty which appellee could lawfully delegate to others.

To sum up what we have said in the foregoing discussion, the trial court correctly refused to rule that appellant was injured in the course of employment for appellee, because the appellee's evidence raised an issue of fact on a point which was capable of outweighing all of the evidence pointing in appellant's favor, and because there was nothing which prevented or rendered illegal an agreement permitting a third

21 The Court began its discussion of the law involved with this statement:

"A railroad's liability under §1 of the F.E.L.A. is to compensate its employees in damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or employees' of such carrier. 45 U.S.C. §51. No question of liability for the fault of officers or employees of the respondent is here raised, but only whether the petitioner's injuries were due to the fault of 'agents' of the respondent within the meaning of the section." 356 U.S. at 328.

22 356 U.S. at 331 n. 5.

party to assume responsibility for this maintenance and repair and to hire anyone, including appellee's regular employees, to discharge this task. Second, with the issue properly reduced to the factual question whether appellee had or had not hired appellant to do this work, the court committed no reversible error in refusing to submit this issue to the jury's consideration by charging them as to the criteria which are usually applied in determining which of two parties is a given individual's employer at a given moment.

We have carefully considered the appellant's other charges of error committed upon the trial and of abuse of discretion in transferring venue, but we find no error nor anything which merits discussion in addition to what we have already said.

The judgment is AFFIRMED.

RIVES, Circuit Judge, Concurring in part and dissenting in part:

I concur in the ruling on the motion to dismiss the appeal and in that part of the opinion relating to said motion. I think, however, that the appellant was an employee of the Railroad, and that, in the maintenance and repair of the spur track or side track, the turpentine company was the "agent" of the Railroad within the meaning of the Federal Employers' Liability Act.[1]

Appellant was in the general employ of the Railroad. The services which he was performing at the time of his injury

[1] I do not mean to intimate that the cost of such maintenance and repair could not by contract be imposed on the turpentine company. That question is not before us.

benefited the railroad as well as the turpentine company. In my opinion, the appellant did not cease to be a Railroad employee when he accepted work on the siding used in the operation of the Railroad. In the maintenance and repair of the siding, I think that the turpentine company was as truly the "agent" of the Railroad within the meaning of the Federal Employers' Liability Act as the Belt Railway was the "agent" of the Missouri-Pacific in switching the latter's car in *Sinkler v. Missouri-Pacific R. Co.*, 1958, 356 U.S. 326, 330.

In *Robinson v. Baltimore & Ohio R. Co.*, 1915, 237 U.S. 84, 92, it was recognized that the contract by which liability was imposed solely on the Pullman Company would be invalid under Section 5 of the Act, now 45 U.S.C.A. §55, if the employee of the Pullman Company were also the employee of the railroad company. Conceding arguendo that the appellant was the employee of the turpentine company, I think that he was also the employee of the Railroad Company. Further, the Pullman Company in that case and the connecting railroad in *Linstead v. Chesapeake & Ohio Ry.*, 1928, 276 U.S. 28, were not considered as "agents" of the defendant railroad, as I think the turpentine company should be under the meaning of "agent" developed in the *Sinkler* case, *supra*.

I therefore concur in part and dissent in part.

CAMERON, Circuit Judge, Concurring:

I concur in the affirmance of the judgment of the district court and in all which was so ably said by Judge Tuttle in concluding that the court below did not commit error in entering final judgment on the merits against appellant and in favor of appellee.

I am not in accord with the portion of the opinion which holds that the appeal was timely. Since the judgment affirmed is a final disposition of the case, I think that the ruling with respect to the appeal is of no practical moment, and have noted my views thereon only to avoid the inference that I would be bound by what is said in the opinion concerning the timeliness of the appeal.

APPENDIX "B"

TRIAL COURT'S INSTRUCTIONS TO THE JURY ON THE ISSUE OF EMPLOYMENT

"In this case it has been stipulated in the record that the particular track being repaired on the morning when this accident occurred was a private track, not a track belonging to the Railroad, but was a private track, and you have heard the amount of conflicting testimony here as to whether or not this plaintiff knew that fact. But it is important for you to keep in mind that this was a private track and that it was the fact that the work was being done on this private track that raises the question as to whether or not plaintiff was in the course of his employment for the defendant at the time of the accident.

"Now, if the defendant Railroad, acting through its foreman, leased or hired its employees including plaintiff Ward to another employer without the plaintiff's knowledge or consent in the change of relationship, the defendant Railroad was not thereby replaced as the plaintiff's employer and was not thereby relieved from liability for injuries sustained by the plaintiff in the course of his employment.

"Now that is a legal phrase expressing the question and I think I can use other language that maybe can help you understand it better.

"The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went to work that morning. You can understand that if his foreman ordered him back to report for work on Saturday morning without explaining to him what he was going to do, or where he had to work, and he did report back and his

foreman carried him off without letting him know any of the facts about what he was doing, the foreman as the Railroad employee and agent would make the Railroad company liable for that act, even if the work was performed on a private track. The evidence on that point is in conflict. All the Railroad employees testified that they all knew, including Ward, that that was a private job that they were going to perform that morning for the sake of making some extra money. Ward denies that. Ward says that nobody told him that he was going to work on a private track and that he wasn't working for the Railroad Company on that day. So that creates the issue that you have to decide on this question as to whether or not Ward was an employee of the Railroad on that occasion. The Railroad is liable, as I have told you, if the fact he was working on that private track was not disclosed to him and he was not afforded an opportunity to decline to work for a third party.

MR. RUTLEDGE: (Employee Ward's Counsel) Your Honor, plaintiff objects to the Charge concerning the employment issue. It was my understanding you charged the issue was whether Ray Ward was told and instructed this was a private track. Now it is the plaintiff's contention that it must have been explained to Ward, or he must have understood before he was hurt, that he was working for a third party, not for the Railroad. The question was whether this was done before Ray Ward was hurt. The mere fact that Ward was told or knew the track was privately owned—

THE COURT: You are right about that if I said it that way.

MR. DELL: (Defendant Railroad's Counsel) I don't think you did, Your Honor.

MR. FAIRCLOTH: (Employee Ward's Counsel) I think you said it that way.

THE COURT: Do you have the Charge?

MR. RUTLEDGE: (Employee Ward's Counsel) I have the note, that is the way I wrote it out. It is not very legible, but that is the way I wrote it out.

THE COURT: Bring the jury back.

(Jury in the box)

THE COURT: Members of the Jury, there is some confusion among counsel as to what I charged you with reference to the plaintiff's knowledge of what he was doing on the day he was injured and I called you back without taking the time to see specifically what I said, but to recharge you on that point.

I attempted to tell you that the Railroad Company was liable to this man for his injury, if he received an injury that day on that track, and there was any negligence in connection with the performance of his work. That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?

MR. RUTLEDGE: (Employee Ward's Counsel) Your Honor, to make it clear he was working for some third person and not working for the Railroad.

THE COURT: Yes, sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have to worry about all the other problems. You will retire and consider your verdict."

CERTIFICATE OF SERVICE

I, Frank G. Kurka, one of the attorneys for the Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day mailed a copy of the foregoing brief to the attorney for the Petitioner, postage prepaid, properly addressed to his regular post office address, as follows:

Neal P. Rutledge
835 duPont Building
Miami 32, Florida

This_____day of July, 1959.

FRANK G. KURKA
Attorney for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 485

RAYMOND P. WARD,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals of March 12, 1959, including the concurring and dissenting opinions, is reported at 265 F.2d 75, and is reproduced at R. 159-179. The United States District Court for the Northern District of Florida did not render an opinion, and its final judgment was not reported but is reproduced at R. 158.

Jurisdictional Statement

The judgment of the United States Court of Appeals was entered March 12, 1959 (R. 179). Petition for a writ of certiorari was filed on June 10, 1959, and was granted on October 19, 1959 (R. 180). The jurisdiction of the United

States District Court was invoked under the Federal Employers' Liability Act, 45 U.S.C., Section 56 and under 28 U.S.C., Sections 1331 and 1332 (a)(1). The jurisdiction of the United States Court of Appeals was invoked pursuant to 28 U.S.C., Section 1291. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes Involved

This case arises under and involves the Federal Employers' Liability Act, 45 U.S.C., Sections 51 et seq. More particularly involved are Sections 51 and 55, which read as follows:

45 U.S.C., Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate

or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

45 U.S.C., Section 55:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66."

Questions Presented

Question I.

Where a Railroad by contract obligates a Customer to maintain to the satisfaction of the Railroad's chief engineer a spur track built by the Railroad partly on the Customer's property and used by the Railroad in interstate commerce to service several customers in the area, and where the Customer, on being advised by the Railroad's section foreman that the track is defective, purports to hire the foreman and his regular Railroad section crew to fix the track to satisfy the Railroad on Saturday at time-and-one-half

their Railroad rate of pay, the crew using their regular Railroad tools to perform the work and working under the supervision of their regular section foreman, does the Railroad as a matter of law continue in its employer-employee relationship to its section crew while so engaged under the Federal Employers' Liability Act or is it relieved of liability under such Act by virtue of such arrangement?

QUESTION II.

Where the principal issue involved in a Federal Employers' Liability Act suit is whether or not the plaintiff (a regular Railroad employee) was working for the Railroad at the time of his injury or was working for the Railroad's Customer, and where the evidence is in dispute as to whether the plaintiff had voluntarily agreed to work for the Customer in repairing a spur track where he was hurt, was it error for the trial court to refuse to charge the jury concerning the usual criteria of employment (e.g., power to control, the furnishing of tools, payment of wages, etc.) and instead to limit the jury's consideration on the employment issue solely to whether or not the plaintiff voluntarily accepted work on the spur track after being advised that if he did so, he would be working for the Customer and not the Railroad, thereby precluding the plaintiff from contending and the jury from finding according to the evidence that the Railroad was the actual employer in control and that the Customer was a mere agent for the Railroad in accomplishing the work with regular Railroad employees?

Statement of the Case

Introduction. Petitioner was plaintiff and appellant below and may sometimes herein be referred to by those terms. Respondent may be referred to as the defendant Railroad or appellee. All emphasis in quoted matter herein is supplied by the writer unless otherwise noted. References to the printed record will be referred to by the symbol "R" and any references to the original typewritten record as transmitted to this Court will be referred to by the symbol "T". For the sake of brevity, the Federal Employers' Liability Act, 45 U.S.C., Section 51 et seq., will hereinafter be referred to as FELA.

Lower Court Proceedings. This suit was originally brought by petitioner on April 30, 1957, against the respondent Railroad under FELA in the United States District Court for the Southern District of Florida, in which District the petitioner then resided (R. 1). The suit claimed damages for injuries allegedly suffered on May 22, 1954, by petitioner while working for the defendant Railroad on a railroad track (R. 1-3). Specifically, plaintiff claimed that his back had been permanently damaged as a result of the defendant Railroad's failure to provide a safe place to work and in requiring the plaintiff to do heavy lifting in an unsafe manner and without adequate help (R. 1-3).

On defendant's motion (R. 3-4), the case was transferred to the Northern District of Florida (R. 7),[1] and there came

[1] Respondent has specifically designated its affidavit in support of its motion to transfer for printing (R. 4-6). Since the ruling on the motion to transfer is not here urged as error, petitioner did not designate its counter affidavit to be printed (T. f-1). Suffice it to say that respondent's affidavit was controverted, and that as a consequence of the transfer, petitioner had to present part of his case by depositions whereas the Railroad was enabled to present its entire case by live witnesses.

on for trial on December 3, 1957, before a jury of eleven members[2] and Judge Dozier A. DeVane (R. 9). At the conclusion of the trial and after receiving the Court's charge, the jury returned a verdict for the defendant Railroad upon which judgment was entered on December 5, 1957 (R. 153, 156-158). Thereafter, the United States Court of Appeals for the Fifth Circuit affirmed the judgment by a divided Court, Circuit Judge Rives dissenting (R. 159-179). This Court granted petitioner's motion for leave to proceed in forma pauperis and his petition for a writ of certiorari on October 19, 1959 (R. 180).

In the trial Court the principal issues litigated concerned the defendant Railroad's alleged negligence[3] and the question of whether or not the plaintiff was injured during the course of his employment with the Railroad. On the employment issue, the plaintiff requested both a peremptory charge that he was employed by the defendant Railroad as a matter of law when injured (R. 155, 141, 143), and alternatively a charge concerning the various factors which the jury should consider in determining by whom the plaintiff was employed when injured, such as the power to control and supervise the work (R. 154-155, 141, 143). All

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[2] In the process of selecting a jury at Gainesville, Fla., the jury panel was exhausted, and the parties stipulated to a trial before an abbreviated jury of eleven jurors (R. 9).

[3] The evidence concerning the Railroad's negligence has not been included in the printed record and is not here material. In brief summary, the plaintiff contended that he was required to hoist railroad ties weighing up to 250 pounds (R. 65, 32, 118), and to slide or swing these ties between his legs while bent over with his head down looking through his legs at the track behind him (R. 17-18, 61-62, 116). An expert safety engineer testified that not only was such a load too great for one man, but that the bent over position required made the lifting most hazardous to the worker's back (T. 82-105, 87). The Railroad contended that the method used was the customary one employed by it for years. See *Urie v. Thompson* (1949), 337 U.S. 163, 178.

such requested charges were denied (R. 141), and due exception was taken to the denial by plaintiff (R. 143). Thereafter, the employment issue was submitted to the jury by the Judge solely on the basis of whether or not the plaintiff's regular Railroad foreman, in asking the section gang to work on the track, had told them either the day before, or just prior to their beginning work that morning, that they were not working for the Railroad but for somebody else (R. 145-146, 152-153).

In the Court of Appeals, petitioner's two principal contentions[4] were the same two points here presented by the petition for a writ of certiorari: (1) that on the undisputed facts, petitioner was as a matter of law an employee of the Railroad when injured regardless of what his foreman told him the day before or that morning; and in the alternative, (2) that the trial Judge erred in refusing to charge the jury concerning the usual criteria governing whether or not an employer-employee relationship exists and in submitting the case to the jury solely on the theory that what the foreman told the gang absolutely governed their relationship. The Court considered both points extensively and determined each adversely to petitioner (R. 162-178). Circuit Judge Rives dissented on the ground that under the decision of this Court in *Sinkler* v. *Missouri-Pacific R. Co.* (1958), 356 U.S. 326, the Railroad's customer was the Railroad's agent insofar as it had obligated itself to maintain the spur track to the satisfaction of the Railroad, and that

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[4] The other points considered by the Court of Appeals but not here involved were (a) whether or not the trial court erred in granting the motion to transfer the case from the Southern District of Florida, Miami Division, to the Northern District of Florida, Gainesville Division, and (b) whether or not the appeal was timely where the notice of appeal was received at the clerk's office on time but was not marked as filed until two days late due to the absence of the clerk from the office on annual leave. The Court ruled the transfer was proper and the appeal timely.

accordingly the plaintiff was an employee of the Railroad as a matter of law regardless of whether he was given to understand that he was working for the Railroad or the customer at the time of injury (R. 178-179).

Statement of Facts. Petitioner was a regular, full-time member of one of respondent Railroad's section crews working in Levy County, Florida (R. 11, 52-53). The section crew or gang consisted of four colored laborers, an apprentice foreman (who was petitioner), and a section foreman (R. 11, 52-53, 17). This gang helped the section foreman perform his duties for the Railroad, which were officially described in the Railroad's rule book as follows (Pl. Ex. #1; R. 12, 13-14):

> "They [section foremen] will have charge of maintenance of their assigned sections, and are responsible for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds. They must direct the work of employees under their supervision and see that they perform their duties properly." Rule 1046.

The crew regularly worked 40 hours from Monday through Friday of each week, but were subject to emergency call during the weekends (R. 54, 72-73), and were paid time-and-one-half for any such over-time work (R. 67, 14, 16, 21, 56-57).

Included in the section of respondent's system where this crew worked was a side or spur track which tied into the Railroad's main line and was known as the "McKenzie siding" (Pl. Exs. ##4 and 5; R. 80-81; R. 11-12, 14, 35, 29). Approximately 150 feet of this spur track was owned by the Railroad, and the remaining 1350 feet was owned by one of the Railroad's customers, the M. & M. Turpentine

Company, and ran over land belonging to the president and owner of that company, D. P. McKenzie (R. 96-97, 80, 82, 63). The spur track had originally been built by the Railroad, and the Railroad had charged its customer, the M. & M. Turpentine Company, for the cost of building that part belonging to it (R. 96-97, 100). In addition, the Railroad obligated its customer to maintain the portion of the track which it owned "to the satisfaction of the Railroad's Chief Engineer" (R. 97, 54-55, 64).[5] It was stipulated that the Railroad used the spur track in interstate commerce (R. 93), and it appeared that the Railroad used the track not only to serve M. & M. Turpentine Company and Mr. McKenzie but also other customers in the area (R. 64, 67, 99). Specifically, it is a well known geographical fact that the locality here involved is a great watermelon producing area, and in the late spring and summer tremendous quantities of watermelons are shipped out to markets all over the country. This spur track was used by the Railroad to accommodate these local watermelon producers as well as the M. & M. Turpentine Company (R. 64, 67, 93, 99). The track was used exclusively by the defendant Railroad's trains (R. 68).

The obligation of the M. & M. Turpentine Company to maintain the track was not an objective one, that is, there were no concrete standards prescribed or any blue prints or detailed specifications concerning the track's maintenance of any sort. The Turpentine Company's obligation was simply to satisfy the Railroad's Chief Engineer (R.

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[5] The contract between the Railroad and the M. & M. Turpentine Company was produced by the Railroad and submitted to the trial Judge during argument on the defendant's motion for a directed verdict, but apparently from a review of the record was not formally introduced into evidence. The substance of the contract, however, was covered by the testimony of witnesses, and the contract itself appeared in the original record before the District Court attached to defendant's Answers to Interrogatories.

97). As testified by the Railroad's section foreman, the only specifications were that the track had to "be safe for the cars to roll on" and had to "come up" to what he felt was safe (R. 55).

Shortly before the accident here involved, the Railroad's section foreman inspected the McKenzie spur track in preparation for the watermelon season and found it to be defective (R. 64-65, 67, 70). He then contacted the Turpentine Company's president, D. P. McKenzie, and advised him that the track would have to be repaired (R. 69-70, 75). Mr. McKenzie asked the foreman to fix the track "in a way that the Coastline wouldn't have any objection to placing their trains out there," at his or his company's expense (R. 67, 64, 66). Foreman Keene agreed to do this, and on Friday, May 21, 1954, after his Railroad section crew had completed their regular five-day, forty-hour week (R. 72-73), he asked his crew if they would work on the McKenzie siding the next day on a voluntary basis to earn some extra money at regular Railroad overtime rates of pay (R. 56, 73, 69-70, 105). The crew agreed to perform this work, and on Saturday they all reported to work at the usual place, the Railroad tool shed (R. 15, 105); at the usual starting time, 7 a.m. (R. 15, 55); took their regular Railroad tools (R. 82-83, 115, 16, 105, 67, 56); and went to the McKenzie siding where they proceeded to repair the track under the supervision, direction and control of their section foreman, Keene, working just as they did during the week (R. 67, 76-77, 16-17). The tools were used pursuant to authorized Railroad policy (R. 97), it being an established practice for the gang to work on privately owned sidings on weekends under the supervision of their foreman (R. 11-12, 35, 97, 92, 54, 77).

The repair work being done on the spur track was the replacement of approximately 19 railroad ties underneath

the track (R. 56, 67, 69, 75). Prior to the arrival of the gang at the track that Saturday morning, Mr. McKenzie had arranged to have his saw mill deliver new ties at the places where section foreman Keene had told him the ties had to be replaced (R. 75). The only other materials needed were spikes, which the crew took from the old ties and used over again (R. 76).

While according to the foreman, Mr. McKenzie was present at the siding when the gang first arrived (R. 63), the foreman admitted that McKenzie did not attempt to supervise or control the manner of doing the work since "he said that he knew that I knew more about it than he did" (R. 64), and he left very shortly after the work got under way (R. 64). The section foreman then proceeded to fix the track to satisfy himself as the Railroad's representative (R. 64, 55, 97). It was during the course of this work that the plaintiff was hurt (R. 17-19, 107, 109, 114, 117).

The crew's wages for the time involved in repairing the spur track were paid at time-and-one-half of their regular Railroad rate, or in other words at the usual overtime scale (R. 56-57, 67, 14, 21). The wages were paid by check given to section foreman Keene by Mr. McKenzie. Keene cashed the check at a local bank and paid the individual crew members in cash (R. 56-58, 65-67). The crew's ordinary Railroad wages were paid twice monthly by Railroad check (R. 77, 112).

There was a marked, clear-cut conflict in the evidence concerning what section foreman Keene told the crew about this particular work before beginning it and also concerning his knowledge of petitioner's injury. Thus, plaintiff testified that he and the crew were "told" by their section foreman to report to work on Saturday to repair the McKenzie siding and that they would be paid overtime for their labor (R. 14-15). He testified that he knew the spur

was called the McKenzie siding but that he did not actually know who owned it, and that he understood that he was working for the Railroad when his back "popped" and he got hurt (R. 29, 32, 35, 17-19). Being unable to straighten up, plaintiff went over to the foreman, reported his injury, and then proceeded to his home on foot, taking almost two hours to walk the distance of a mile in his bent over position (R. 19-20). On arrival home, he went to bed and stayed in bed the rest of the day while his wife summoned a doctor who prescribed a "kidney plaster" (R. 20-21, 87-89). Later that afternoon, according to both plaintiff and his wife, section foreman Keene came to their house, gave plaintiff's wife his pay for the day's work in cash, and talked to plaintiff from the door of his bedroom (R. 89, 21). Eventually plaintiff was admitted to the Railroad hospital in Waycross, Georgia, for more extensive treatment (R. 23).

Foreman Keene, on the other hand, testified that he positively told the crew "when we got on the job" that they were on a private track and that the Railroad was not responsible for them (R. 69), but that he was not sure whether or not he had told them such information on the previous afternoon (R. 70). He denied having any knowledge of petitioner's getting hurt that morning or leaving the job (R. 56-57, 61, 78), and testified that he later that day twice saw petitioner walking around the town of Chiefland with no apparent injury, and that on one such occasion he paid petitioner his pay for the day's work (R. 65, 57-58). He admitted that petitioner did not report for work the following Monday as usual, but stated that this was explained to him on Saturday by petitioner as being due to the fact petitioner's wife was pregnant (R. 58). Petitioner's subsequent admission to the Railroad hospital was apparently attributed by Keene to petitioner's having been hurt while playing baseball (R. 60-61, 78-80). In short,

the foreman denied all knowledge of the injury and admittedly filed no report with the Railroad concerning it (R. 78, 61, 137-138).

Two of the four colored section hands who were still with the Railroad at the time of trial also testified as Railroad witnesses (R. 104-111, 112-118). Both confirmed that petitioner got hurt that Saturday morning and walked off the job (R. 107, 114, 117). Both also testified that "the boss man" had asked them on the Friday afternoon before the accident if they wanted to make some extra time and some extra money by working on a private track, that they all agreed at that time to do so (R. 105, 113), and that they were specifically and especially warned by their foreman that Saturday morning that "you are not working for the Coastline now and you want to be sure that you don't get hurt" (R. 117).

With the evidence in this condition, the trial Judge submitted the employment issue to the jury on the simple basis that petitioner's employment status depended entirely upon what his foreman had told him, regardless of who controlled and supervised the work, charging (R. 145-146):

> "The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went to work that morning."

And (R. 152):

> "That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money."

During the charge conference[6] with the trial Judge, the Judge had made it clear that he was not going to submit the case to the jury on either of plaintiff's alternate theories of the case and had specifically rejected plaintiff's requested charges #2, #4, #5, and #6 which embodied those contentions, while noting, of course, plaintiff's objection to such ruling (R. 154-155, 141-143). During the giving of his charge, however, it seemed to plaintiff that the Judge was committing additional error, even under the Court's theory of the case, by charging that the question turned on whether plaintiff knew that the track was a "private track" or not (R. 145-146). Accordingly, plaintiff made additional objection to the charge at its conclusion on this further ground (R. 151-152), but by no means was such action intended or should it be construed as an abandonment of plaintiff's basic position as expressed and embodied in its requested charges and the legal authorities submitted in their support (R. 154-155).

Summary of Argument

Petitioner's argument is basically two-fold, each part involving the principles of two recent FELA decisions of this Court: *Sinkler* v. *Missouri-Pacific Railroad Company* (1958), 356 U.S. 326, and *Baker* v. *Texas and Pacific Railway Co.* (1959), 359 U.S. 227.

I.

Under the undisputed facts of this case, petitioner as a matter of law was an employee of the respondent Railroad when injured for the following reasons:

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[6] The charge conference was considerably more lengthy than is indicated by the brief report in the record (R. 141-143), which is merely a report of the final outcome of the conference and a formal record of plaintiff's and defendant's objections to the Court's refusal to grant their requested charges (R. 143).

A. The M. & M. Turpentine Company by obligating itself to the Railroad to maintain the spur track to the satisfaction of the Railroad's Chief Engineer necessarily submitted itself to the control and supervision of the Railroad and accordingly, even under pre-*Sinkler* decisions, became an agent for the Railroad in the performance of this work. The Railroad used this spur track in interstate commerce as a part of its total system to service many customers in the area. It had a non-delegable duty to its shippers, its passengers, and to its employees to see that this track was maintained properly, regardless of who owned the track. It passed this obligation on to the M. & M. Turpentine Company but reserved to itself such control that under basic common law principles the M. & M. Turpentine Company became the Railroad's agent. The M. & M. Turpentine Company had no objective standards by which to maintain the track independently and hence had to follow Railroad control in order to fulfill its obligations to satisfy. The basic factor of control is decisive here and therefore the petitioner legally remained in the Railroad's employ regardless of what he was given to understand by his section foreman. He was either working for the Railroad directly or was working for the Railroad's agent. In either case, he was covered by FELA.

B. Under the *Sinkler* decision, the M. & M. Turpentine Company clearly became the agent of the Railroad as a matter of law even if the Railroad did not reserve to itself sufficient control to render such company its agent under the common law. *Sinkler* holds that where a Railroad delegates its "operational activities" to another company by contract, such other company for the purposes of FELA becomes the agent of the Railroad regardless of traditional common law considerations. Ordinary maintenance of a track used by a railroad in interstate commerce to serve

local producers, as distinguished from major overhaul or new construction, is an operational activity of the railroad. Having agreed to perform this operational activity for the Railroad and to the Railroad's satisfaction, the M. & M. Turpentine Company became the Railroad's agent, and as such, its employment of the Railroad's regular employees to work on the track would not legally destroy under FELA their status as Railroad employees. The rationale as well as the specific holding of *Sinkler* here applies.

C. Section 5 of FELA outlaws any device designed to escape liability under FELA. Here, the Railroad has created an elaborate scheme the effect and obvious purpose of which is to avoid liability under FELA. Thus, the Railroad first obligates its customers to maintain tracks which form part of its total system to the Railroad's satisfaction; the Railroad then through its section foreman supplies its regular section gang, equipped with Railroad tools, to the customer to perform the necessary work at the customer's expense, the foreman being most careful to specify that the crew will not be working for the Railroad and warning them "not to get hurt" because the Railroad will not be responsible. The consequence is that a regular Railroad worker, injured in the course of such employment, receives neither workmen's compensation nor the benefits of FELA, as happened here. The Railroad gets the obvious benefit of uniform maintenance work on its entire system, done under its control and to its satisfaction with its own employees and tools, but without the corresponding burden of FELA liability, workmen's compensation, or any other type of employee protection. Here, if the Railroad itself had paid the crew and billed the Customer for the cost of the work, FELA coverage would be obvious. The fact that the Railroad's section foreman instead billed the Customer and paid the crew in cash should make no difference. The

coverage of FELA should not depend on form rather than substance.

II.

The *Baker* case held that the question of whether an employee, in performing extraordinary railroad maintenance work, was working for an independent contractor not under FELA or was working for an agent of the railroad under FELA was a matter of Federal law and was to be determined according to the ordinary rules governing this familiar legal problem. While no one feature of the relationship is absolutely determinative, the element of control is the most significant. Since each case necessarily differs from another on its own peculiar facts, the question under Federal law is ordinarily one for the jury to decide under appropriate instructions as to the various relevant factors legally applicable. In this case petitioner duly requested the trial Judge to so submit the question to the jury under an appropriate instruction which described those various relevant factors. In denying that request, and in submitting the question to the jury solely upon the basis that petitioner's status was determined by what his foreman told him, the trial Court erred and ruled contrary to the *Baker* decision. What the parties believe or express their relationship to be does not necessarily determine it, where the actual realities are otherwise. While failure to obtain petitioner's consent to his being "lent to" or "borrowed by" the Railroad's customer would legally require a holding that he remained the Railroad's employee, the converse is not equally true. Thus, a servant may be told he is being lent and consent to it, but nevertheless remain actually and in fact under the control and therefore in the employ of his original master.

Argument

I. On the Undisputed Facts of This Case, Petitioner Was an Employee of Respondent Railroad as a Matter of Law When Injured. The Trial Court Therefore Erred in Denying Petitioner's Request for a Peremptory Charge on the Employment Issue.

At the conclusion of the trial, petitioner duly requested the following peremptory instruction on the employment issue (R. 155):

> "The Court charges you as a matter of law that the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured."

The Court rejected this request (R. 155, 141), and instead submitted the employment issue to the jury solely and exclusively on the Court's theory that plaintiff's employment status when hurt depended entirely upon whether or not petitioner's railroad foreman told him he was not working for the Railroad but for somebody else that Saturday morning (R. 145-146, 152-153).

While the trial Court's theory has an engaging simplicity about it, petitioner respectfully submits that it ignores and conflicts not only with basic common law principles but more significantly with applicable decisions of this Court and a long line of lower federal court decisions concerning FELA. Under these governing decisions, petitioner was on the *undisputed* facts of this case an employee of the respondent Railroad when injured for the following reasons:

A. The M. & M. Turpentine Company Was Respondent Railroad's Agent in Performing the Work Here Involved Because the Power to Control the Work Was Reserved by the Railroad.

While there was a severe conflict in the evidence concerning what section foreman Keene had told petitioner about his status while working on this spur track, there was no conflict whatsoever in the evidence concerning the relationship between the respondent Railroad and the M. & M. Turpentine Company. Indeed, all of the evidence concerning this latter relationship came either from foreman Keene or the Railroad's own witnesses.

Under this undisputed evidence, it appeared that the Railroad used the spur track here involved in interstate commerce and used it not only to serve the M. & M. Turpentine Company but to serve local agricultural producers in the area also. In short, the spur track tied into the Railroad's main line, was partly owned by the Railroad, and was used by the Railroad as a part of its total system. It was not, in other words, a purely private track.

Being a part of the Railroad's system, the track and its maintenance were necessarily a matter of concern and responsibility to the Railroad. For example, the Railroad has a non-delegable duty to its employees to furnish them a safe place in which to work. This duty exists regardless of whether the track or place involved is owned by the railroad or by its customer. See *Ryan* v. *Twin City Wholesale Grocer Co.* (1941), 210 Minn. 21, 297 N.W. 705. Thus a railroad is liable to its employees for injuries caused by a defective or obstructed spur track even though (as here) the spur runs over private land and the railroad has delegated the duty of maintenance to the owner. *Ruddy* v. *New York Central Railroad Co.* (CA 2, 1955), 224 F.2d

96, cert. den., 350 U.S. 884; *Terminal R. Assn. of St. Louis* v. *Fitzjohn* (CA 8, 1948), 165 F.2d 473. The Railroad obviously has comparable non-delegable duties to its shippers and its passengers to see to it that the tracks upon which it operates, regardless of ownership, are safe. In brief, the proper maintenance of this spur track here involved was not a matter of indifference to the Railroad. The Railroad's rules themselves quite properly reflect its interest in the safe condition of such tracks as these by imposing at least the duty to inspect all privately owned tracks within his section on the section foreman (Pl. Ex. #1; R. 12-14).

Being concerned about the proper safety and maintenance of this spur track, the Railroad chose to impose by contract the express obligation on its customer, the M. & M. Turpentine Company, to maintain the track "*to the satisfaction of the Chief Engineer of the Atlantic Coastline Railroad*" (R. 97). Such an arrangement necessarily reserved in the Railroad the power to control *how* the track should be maintained. In other words, the customer here did not contract to perform a specified and described piece of work according to objective standards. This was not a contract to produce a given result according to agreed-upon plans, blueprints, or specifications leaving the contractor free to employ any means he might choose to accomplish the end result. Rather, it was a contract to maintain continuously a piece of track—how?—to the satisfaction (whatever that may be) of the Railroad's Chief Engineer. A more obvious agency relationship could not be described. The M. & M. Turpentine Company could not possibly act independently from the Railroad in performing such work. As shown by the evidence, the president of the turpentine company, when advised that the track needed repair, simply told the Railroad's foreman to fix the track "in a way that the Coastline wouldn't have any

objection to placing their trains out there" (R. 67) and that "he knew that I [the foreman] knew more about it than he did" (R. 64). Under the existing arrangement, the president had no choice and could say nothing else since all the power to control was in the Railroad.

This lack of detailed plans or objective specifications, coupled with the obligation "to satisfy" the railroad, has previously been considered in precisely this context of determining whether a contractor with a railroad was under FELA an independent contractor or the railroad's agent. In *Cimorelli* v. *New York Central R. Co.* (CA 6, 1945), 148 F.2d 575, the plaintiff was an admitted and regular employee of the Duffy Construction Company which had contracted with the defendant railroad to perform certain loading operations for the railroad. There, as here, the contract was general and indefinite, and further required that the work be done to the satisfaction of the railroad. In deciding that the plaintiff was as a matter of law an employee of the railroad under FELA, the Court referred to these circumstances as showing that the railroad actually was in control of not only what was done, but how it was done, and accordingly was the true or ultimate employer, the contractor being a mere agent of the railroad.[6a]

[6a] See also *Pennsylvania R. Co.* v. *Barlion* (CA 6, 1949), 172 F.2d 710, and *Pennsylvania R. Co.* v. *Roth* (CA 6, 1947), 163 F.2d 161, cert. den., 332 U.S. 830, where the general and indefinite nature of the contract between the railroad and the contractor necessitated detailed supervision by the railroad, thereby creating an agency relationship under FELA. In attempting to distinguish these cases and the *Cimorelli* case from the instant case, the Court of Appeals below stated (R. 169) that in none of them had the parties "expressly negated the existence of the legal relation which the circumstantial evidence established as a matter of fact or of legal construction." In this regard petitioner respectfully submits the Court erred since *Cimorelli* involved a contract that expressly stated the contractor was an independent contractor, and in all three cases, *Cimorelli, Barlion* and *Roth,* the employee involved was a regular employee of the contractor, not the railroad, and so of course understood he was working for the contractor.

Indeed, this duty to satisfy has even been held to outweigh express provisions in a contract negating control by the railroad and stating that the contractor shall be an independent contractor. *Cimorelli* v. *New York Central R. Co., supra; Wabash RR. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94, 99-100, app. dism'd, 160 F.2d 891.

By the same token, the presence of detailed, objective plans and specification in a contract between a railroad and a third party is most indicative and persuasive in a FELA suit that the relationship is a truly independent contractor one. *Tinsley* v. *Massman Const. Co.* (Mo., 1954), 270 S.W.2d 835.

In summary, petitioner here submits that the undisputed evidence of this case conclusively shows that the Railroad not only retained the power to control the manner of performing this maintenance work, but that it actually exercised this power to control through its foreman who supervised the work and saw to it that the Railroad was satisfied. Having retained and exercised this power of control and supervision, the Railroad must in law be deemed to have appointed and utilized the M. & M. Turpentine Company as its agent. The factor of control and supervision over the work is decisive in holding the Railroad here as the actual and legal employer. See *Linstead* v. *Ches. & Ohio Ry.* (1928), 276 U.S. 28; *Railroad Company* v. *Hanning* (1872), 15 Wall. 649, 82 U.S. 649; *Cimorelli* v. *New York Cent. R. Co.* (CA 6, 1945), 148 F.2d 575; *Pennsylvania R. Co.* v. *Barlion* (CA 6, 1949), 172 F.2d 710; *Pennsylvania R. Co.* v. *Roth* (CA 6, 1947), 163 F.2d 161, cert. den., 332 U.S. 830; *Halderman* v. *Pennsylvania R. Co.* (CA 2, 1931), 53 F.2d 365; *Byrne* v. *Pennsylvania Railroad Company* (CA 3, 1958), 262 F.2d 906, cert. den., 359 U.S. 960; *Wabash RR. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94, app.

dism'd, 160 F.2d 891; *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503.

B. Under the *Sinkler* Decision, the M. & M. Turpentine Company Became the Agent of the Railroad for the Purposes of FELA Regardless of the Control Reserved or Exercised by the Railroad.

The decision of this Court in the case of *Sinkler* v. *Missouri-Pacific Railroad Company* (1958), 356 U.S. 326, is clearly a land-mark case in the ample history of FELA litigation. By its terms, the relationship under FELA between a railroad and a third party hired by the railroad to perform railroad operational activities does not turn upon the nice, common-law distinctions (frequently obscure in individual cases) between an agency relationship and an independent contractor relationship. For purposes of FELA a person engaged in either capacity by the railroad to perform operational activities is deemed in law to be the railroad's agent.

This case, admittedly and quite obviously, does not arise in precisely the same posture as the *Sinkler* case. In *Sinkler* the injured plaintiff was concededly an employee of the defendant railroad; here it is not so conceded. In *Sinkler* the delegated or contracted activity was the switching of cars; here it is the maintenance of track.

Despite these differences, petitioner submits that the holding and rationale of the *Sinkler* case requires a holding in this case that petitioner did not lose his status as a railroad employee under FELA by going to work for the M. & M. Turpentine Company on this spur track. For here, as in *Sinkler*, the petitioner was engaged in furthering the task of the railroad's total enterprise and comes clearly within the class and category of workers Congress sought to protect by FELA. It is submitted that where a contrac-

tor has been engaged by the railroad to perform regular and normal railroad work and the contractor uses regular railroad employees in the task, such employees as a matter of law should retain their status under FELA as railroad employees, regardless of whether the relationship between the railroad and the contractor is one of agency or of independent contractor, as tested by common-law principles. Every reason in *Sinkler* for giving a broader-than-common-law construction to the word "agent" in Section 1 of FELA applies with equal force here for holding that the M. & M. Turpentine Company was as a matter of law the Railroad's agent in using the Railroad's employees to maintain this track pursuant to its contract obligation to the Railroad.

A holding to this effect has at least been intimated already by an Illinois court. Thus, in *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503, the railroad engaged an allegedly independent contractor to perform certain regular loading operations previously performed by railroad employees, and then proceeded to transfer its regular employees to the contractor's payroll. The Court, in affirming the trial court's peremptory instruction to the jury on the employment issue, ruled as a matter of law that the contractor's employees were eligible to sue the railroad under FELA for injuries received in the course of their work, the contractor being an agent of the railroad.

Likewise, the Court of Appeals for the Seventh Circuit has expressly stated in *Miles* v. *Pennsylvania R. Co.* (CA 7, 1950), 182 F.2d 411, 414, that:

> "Admittedly the defendant [railroad] could not have escaped the liability imposed by this Act [FELA] by contracting with a contractor to take over *the ordinary and necessary maintenance work on track which it used in interstate commerce.*"

The Court there distinguished such ordinary and necessary maintenance work from new construction, extraordinary repairs or major overhauls, which could reasonably be expected to be contracted out by the railroad. Compare *Dougall* v. *Spokane, P. & S. Ry. Co.* (CA 9, 1953), 207 F.2d 843, cert. den., 347 U.S. 904, with *Erie R. Co.* v. *Margue* (CA 6, 1928), 23 F.2d 664. Certainly it would logically seem that regular and ordinary maintenance work is as much "operational activity" as the switching of cars or the giving of signals.[7] But in any event, as succinctly stated by Judge Rives in his dissenting opinion (R. 178):

> "Appellant was in the general employ of the Railroad. The services which he was performing at the time of his injury benefited the Railroad as well as the turpentine company. In my opinion, the appellant did not cease to be a Railroad employee when he accepted work on the siding used in the operation of the Railroad. In the maintenance and repair of the siding, I think that the turpentine company was as truly the 'agent' of the Railroad within the meaning of the Federal Employers' Liability Act as the Belt Railway was the 'agent' of the Missouri-Pacific in switching the latter's car in Sinkler v. Missouri-Pacific R. Co., 1958, 356 U.S. 326, 330."

Petitioner is not contending that regular employees of the turpentine company would necessarily become employees of the railroad simply and only because they do maintenance work on a company-owned track. But he is contending that regular employees of the Railroad do not lose their status as such by virtue of working on a system track doing work which the Railroad has required to be done by the Railroad's contractor.

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[7] Cf. *Atlantic Coast Line R. Co.* v. *Treadway* (1917), 120 Va. 735, 93 S.E. 560, cert. den., 245 U.S. 670.

C. Section 5 of FELA Requires the Legal Conclusion That Petitioner Did Not Lose His Status as a Railroad Employee by Working for the M. & M. Turpentine Company.

If the writings and protests of railroad counsel are any fair indication, the railroads feel much "harassed" by FELA and would much prefer a "reasonable" compensation act in its stead, if for no other reason (they say) than to prevent this Court's concepts and principles interpreting FELA from spreading "to permeate other branches of the law" as well. Wright, "The Employers' Liability Act: Does the Supreme Court Want It Repealed?" 45 Amer. Bar Assoc. Journal 151, 202. Such proposals, of course, are most appropriately addressed to Congress and presumably have been so addressed with due diligence since 1908. To date, however, the only Congressional reaction has been to expand the coverage of the Act within the railroad industry itself and to apply it to maritime employees as well. 53 Stat. 1404, 45 U.S.C. 51; 41 Stat. 1007, 46 U.S.C. 688.

Perhaps anticipating the Act's unpopularity with employers in the industry, Congress expressly provided in Section 5 thereof, 45 U.S.C. 55, that any contract, rule, regulation or device whatsoever designed to exempt a railroad from liability under the Act should be to that extent void. This provision quite obviously outlawed such unsubtle avoidance techniques as the general releases usually required at that time to be executed by all new employees.[8] Realizing this, the railroads attempted nevertheless to continue the use of such general releases, whenever possible, through the convenient device of hiring workers as "independent contractors" to whom Section 5 would not apply.

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[8] See, e.g., the general and prospective release involved in *Robinson* v. *Baltimore & Ohio R. Co.* (1915), 237 U.S. 84.

The attempt met with outstanding success in the 1916 decision of this Court holding that the surviving representatives of a man hired by the railroad to shovel coal and grade it according to size, who was killed in the course of his work allegedly through the negligence of the railroad, could not claim damages from the railroad because he was an "independent contractor" rather than an employee and accordingly had the privilege to sign a release and hold harmless contract when hired. *Chicago, R.I. & P.R. Co.* v. *Bond* (1916), 240 U.S. 449.

Blessed with such success, railroads since that time have delegated to independent contractors virtually every phase of the entire railroad operation from freight handling[9] and track laying[10] to cleaning up ashes from underneath a turn table[11] and the firing of locomotives.[12] In perhaps the most extreme case the entire railroad operation "down to the last paper clip" was delegated by the railroad to a sister corporation which then proceeded to contend that FELA did not apply. *Eddings* v. *Collins Pine Company* (D.C. Calif., 1956), 140 F. Supp. 623.

Despite the *Bond* decision, however, the railroads have not been entirely successful in contending that the independent contractor device automatically guarantees immunity from FELA. The leading post-*Bond* case upon the subject is *Erie R. Co.* v. *Margue* (CA 6, 1928), 23 F.2d 664, where the railroad delegated the responsibility of maintaining its entire right of way in the State of Ohio to a construction company as an independent contractor, and expressly

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[9] *Bugg* v. *Sanders* (1929), 219 Ala. 129, 121 So. 410.

[10] *Orange* v. *Pitcairn* (1935), 280 Ill. App. 566.

[11] *Polluck* v. *Minneapolis & St. L. R. Co.* (1918), 40 S.D. 186, 166 N.W. 641, cert. den., 248 U.S. 558.

[12] *Wabash R.R. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94.

provided that the company must comply with the Ohio workmen's compensation laws. Holding that an obvious purpose of such arrangement was to substitute state compensation law for FELA, the Court of Appeals ruled that an employee of the contractor by virtue of Section 5 could nevertheless sue the railroad under FELA.

In light of this decision, the Ohio state court thereafter similarly ruled that the state compensation law did *not* apply or cover employees of an independent contractor engaged by the railroad to regularly maintain all of its rolling stock because they were covered by FELA. *Moore* v. *Industrial Commission* (1934), 49 Ohio App. 386, 197 N.E. 403.

An Illinois court has ruled to like effect in *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503, holding that to recognize a contractor engaged by the railroad to unload vessels, to whose payroll the railroad had transferred its employees, would violate Section 5. And while not directly there involved, the Court of Appeals for the Seventh Circuit has expressly stated that a railroad cannot escape FELA liability "by contracting with a contractor to take over the ordinary and necessary maintenance work on track which it used in interstate commerce." *Miles* v. *Pennsylvania R. Co.* (CA 7, 1950), 182 F.2d 411, 414.

Under these later and, it is respectfully submitted, better-reasoned decisions, petitioner contends that to hold the M. & M. Turpentine Company here to be an independent contractor whose employment of petitioner destroyed his status as a railroad employee under FELA would be a clear violation of both the meaning and purpose of Section 5. This is particularly true since this is not a case where the railroad simply delegated one of its activities to a contractor with non-railroad employees. Here, the

delegation has been accomplished so as to use regular railroad employees to perform their regular railroad work, but free from the burden of FELA liability. The obvious purpose is precisely such avoidance. Thus, the Railroad here first obligates its customers to maintain, to the Railroad's satisfaction, track which forms a part of its total system and which it admittedly uses in interstate commerce; next the Railroad through its section foreman supplies its regular section gang, equipped with Railroad tools, to the customer to perform the necessary work at the customer's expense, the foreman being most careful to specify to the crew that they are not then working for the Railroad and particularly warning them not to get hurt because the railroad will not be responsible.

The consequence of all this is simply that a regular railroad worker, injured in the course of his employment on the railroad, receives neither workmen's compensation nor the benefits of FELA, which is precisely what occurred in this case.

The Railroad, on the other hand, gets the obvious benefit of uniform maintenance work on its entire system, performed under its control and to its satisfaction with its own employees and tools, but without any "harassing" burden of FELA liability or even the "reasonable" liability of workmen's compensation.

Stripped down to its essentials, what happened here is very clear. The Railroad fixed this spur track to suit itself and charged the turpentine company the expense involved. Certainly if the Railroad here had itself paid its crew and formally billed the turpentine company for the cost, FELA coverage would be obvious. The fact that the Railroad's section foreman, instead, billed the customer and paid the crew in cash should make no difference unless mere form is to prevail over substance and reality.

II. The Trial Court Erred in Failing to Charge the Jury as Requested Concerning the Applicable Legal Factors Governing the Employment Issue.

Alternatively, petitioner contends that the ruling of the trial Judge and the holding of the Court of Appeals below is in direct and irreconcilable conflict with the recent decision of this Court in *Baker* v. *Texas and Pacific Railway Co.* (1959), 359 U.S. 227. In *Baker* an employee of an allegedly independent contractor engaged by the railroad to perform work on its right of way was killed during the course of his employment. His legal representative brought suit against the railroad under FELA claiming that the contractor was actually only an agent of the railroad since the railroad controlled the manner and details of the work. The Texas courts ruled as a matter of law that the deceased was an employee of an independent contractor and therefore the suit could not be maintained under FELA.

In reversing the case and remanding for a new trial, this Court ruled that the question under FELA was properly one for the jury to determine under appropriate instructions. The Court indicated that such appropriate instructions were the usual ones pertaining to whether an independent contractor or agency relation existed as indicated by the Restatement, Agency 2d, Section 220. In short, when the employment issue involves conflicting factual elements or inferences requiring its submission to the jury, the jury should be advised concerning the various distinguishing features which legally determine the nature of the relationship.

Petitioner in this case duly requested such appropriate instructions (Pl.'s Requested Instructions #'s 2, 4 and 5; R. 154-155). The trial Court rejected them on the ground

that they were not applicable in this case because the employment issue depended and turned entirely upon what the plaintiff's foreman told him before beginning work on the spur track. The Court of Appeals affirmed, likewise on the ground that if the foreman told petitioner he was not working for the Railroad this absolutely precluded a finding that he was nevertheless a Railroad employee. In so holding, the Court distinguished the *Cimorelli* v. *New York Central R. Co., supra,* decision and others involving employees of alleged independent contractors on the ground that (R. 169) " * * * in none of these cases were the courts dealing with an employee who had been expressly told beforehand that he would not be working for the railroad."

Petitioner respectfully submits that in so holding the Court below quite clearly erred.

In the first place, *Cimorelli* did involve a situation where the contract between the Railroad and the contractor expressly provided that the contractor was to have "exclusive supervision" of the manner and method of doing the work and was to be considered an "independent contractor." In other words, the railroad in *Cimorelli* indicated its unwillingness to enter into an employer-employee relationship with the plaintiff even more forcefully than did the Railroad here. Likewise, the employee there involved was hired and paid by the contractor *exclusively,* and was the contractor's regular employee rather than the railroad's. It was certainly just as clearly manifested to him that he was not intended to be a railroad employee as it was to petitioner here.

But in any event, the Court by placing controlling significance upon what the foreman said obviously overemphasized only one of the many factors which should have been submitted to the jury. Thus, the Restatement,

Agency 2d, Section 220, lists control over the details of the work as the very first, prime factor to be considered, and refers to the belief of the parties as to the nature of their relationship as merely the next-to-last, commenting:

> "It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control, by the other. * * * " Restatement, Agency 2d, Section 220, Comment m.

In short, what the parties believe or express their relationship to be does not necessarily determine it, where the true realities are otherwise. *Cimorelli* v. *New York Cent. R. Co., supra; Wegman* v. *Great Northern Ry. Co.,* 189 Minn. 325, 249 N.W. 422; *Marion Steam Shovel Co.* v. *Bertino* (CA 8, 1936), 82 F.2d 541, cert. den., 299 U.S. 556.

Petitioner of course contended below that if the foreman had failed to tell him that he would not be working for the Railroad, and he was asked or directed by his foreman to perform this work, then he necessarily remained in the employ of the Railroad on the principle that a servant may not be lent to or borrowed by another without his consent. *Chicago, R.I. & G. Ry.* v. *Trout* (Tex. Civ. App., 1920), 224 S.W. 472; *Terminal R. Assn. of St. Louis* v. *Fitzjohn* (CA 8, 1948), 165 F.2d 473.

But the converse of this contention does not hold true, and it does not follow that if he was so advised he must conclusively be deemed a non-Railroad employee. Thus, a servant may be told he is being lent and consent to it, but nevertheless remain actually and in fact under the control and therefore in the employ of his original master. Such apparently was the situation in *Marion Steam Shovel*

Co. v. *Bertino* (CA 8, 1936), 82 F.2d 541, cert. den., 299 U.S. 556.

Finally, if the Railroad here actually lent its regular employee to its agent, the fact it told the employee that he was working for the agent and not the Railroad would be a matter of complete insignificance. Being an employee of the Railroad's agent, petitioner would still retain the right to maintain his suit against the Railroad under FELA. *Baker* v. *Texas and Pacific Railway Co., supra.*

In summary, therefore, petitioner submits that under the *Baker* decision of this Court, the judgment rendered below should be reversed and the case remanded for retrial for failure of the trial Judge to submit the employment issue to the jury under appropriate instructions as requested.

CONCLUSION

For the foregoing reasons, both singly and in combination, petitioner respectfully prays that the judgment rendered below be reversed and the case be remanded to the District Court for a new trial with directions to instruct the jury that petitioner as a matter of law was in the employ of the respondent Railroad when injured; or in the alternative, with directions to instruct the jury concerning the proper and relevant factors determining his status.

Respectfully submitted,

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Dated: February 9, 1960

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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 485

RAYMOND P. WARD, *Petitioner*

v.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent

BRIEF FOR RESPONDENT

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No. 485

RAYMOND P. WARD, *Petitioner*

v.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent

BRIEF FOR RESPONDENT

INTRODUCTION

Writ of Certiorari was granted 19 October 1959 herein on the petition of RAYMOND P. WARD, to a judgment entered 12 March 1959 by the United States Court of Appeals for the Fifth Circuit which had therein affirmed a jury verdict and judgment entered thereon against WARD, as PLAINTIFF in an action prosecuted by him in the United States District Court for the Northern District of Florida under the Federal Employers' Liability Act to recover for injuries suffered while he allegedly was acting in the course of his employment as an employee of ATLANTIC COAST LINE RAILROAD COMPANY.

For convenience, the parties hereinafter will be referred to as PETITIONER and RESPONDENT, the Statute involved

as "FELA", and references herein to the printed transcript of the record will be made by the symbol "R".

RESTATEMENT OF THE QUESTIONS PRESENTED

Petitioner's brief frames two questions as controlling and decisive in this Court's consideration of the issues made by his petition. Respondent submits that neither of the "Questions" as framed appear to state a proper premise under those facts in this case which appear material to the actual proposition of law which Petitioner seeks to have the Court apply.

Under the proposition of law asserted by "Question 1", Petitioner seeks to have the Court extend the doctrine of "non-delegable duty" to the maintenance of private sidetracks. In stating the premise for the application of this doctrine, under the circumstances peculiar to the private sidetrack in this case, Petitioner fails to take into account certain material facts, undisputed in the case, which require the following restatement of the proposition asserted:

QUESTION I.

WHETHER THE MAINTENANCE OF A PRIVATE SIDETRACK, CONNECTED WITH THE RESPONDENT'S MAIN LINE AND USED IN INTERSTATE COMMERCE IS SO ESSENTIAL TO RESPONDENT'S "OPERATIONAL ACTIVITIES" THAT THE "FELA" IMPOSES A "NON-DELEGABLE DUTY" ON RESPONDENT TO PERFORM THIS MAINTENANCE, WHERE SUCH PRIVATE SIDETRACK WAS INSTALLED ON PRIVATE PROPERTY AT THE REQUEST AND FOR THE CONVENIENCE OF A SHIPPER WHO OWNED THE LAND ON WHICH IT WAS INSTALLED, PAID THE ENTIRE COST OF AND OWNED THE INSTAL-

LATION, HAD EXCLUSIVE CONTROL OF ITS USE AND MAINTENANCE SUBJECT ONLY TO INSPECTION BY RESPONDENT FOR SAFETY, AND WHICH WAS IN ADDITION TO THE REGULAR SIDETRACK LOADING FACILITIES PROVIDED BY THE RAILROAD FOR THE USE OF OTHER LOCAL SHIPPERS, WHO *WITH THE OWNER'S CONSENT* OCCASIONALLY USED THE PRIVATE SIDETRACK FOR LOADING PURPOSES.

Petitioner's "Question II" relates to whether the jury was properly instructed by the Trial Court on the issue of employment. In framing this question, Petitioner has exercised a rather novel license by assuming as an essential part of his premise the very proposition of law put in issue by his "Question I"; that is, under the circumstances peculiar to this case, that the law does impose a "non-delegable duty" on Respondent to maintain the private sidetrack on which Petitioner was working when injured, as the basis for his contention that the jury should have been charged according to the employment instructions requested by Petitioner, but rejected by the Trial Court.

If the premise of "non-delegable duty" as assumed in Petitioner's "Question II", is determined by the Court to be the law of this case, then it becomes decisive under "Question I" and the issue Petitioner seeks to raise by "Question II", as framed, becomes moot; Otherwise, Petitioner's "Question II", as framed, includes an erroneous assumption of law.

The premise stated in "Question II" also fails to take into account material evidence adduced at the trial on the issue of employment, as well as the basis on which the Trial Court actually charged the jury on that evidence, all of which compel the following restatement of the proposition asserted:

QUESTION II.

WHETHER PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO GIVE HIS REQUESTED INSTRUCTIONS ON THE ISSUE OF EMPLOYMENT, WHERE THE INSTRUCTION GIVEN BY THE TRIAL COURT SUBMITTED THIS ISSUE TO THE JURY ON THE BASIS THAT RESPONDENT HAD TO PROVE THAT PETITIONER HAD VOLUNTARILY AGREED TO ACCEPT OTHER EMPLOYMENT ON HIS DAY OFF TO MAKE EXTRA MONEY BY REPAIRING A PRIVATELY OWNED SIDETRACK, THAT PETITIONER KNEW THE SIDETRACK WAS OWNED BY A THIRD PARTY WHO WAS TO PAY HIM FOR HIS WORK, AND THAT IN THIS UNDERTAKING HE WAS TOLD BEFOREHAND THAT HE WOULD BE WORKING FOR THE OWNER OF THE SIDETRACK, AND NOT FOR RESPONDENT.

COUNTER-STATEMENT OF THE CASE

Lower Court Proceedings: Respondent accepts the statements made in the corresponding subdivision of Petitioner's brief relating the procedural history of this case, albeit being somewhat at a loss to find justification for the irrelevant comment set forth at footnote 1 thereof referring to the "change of venue" ruling made by the Court of Appeal's judgment under attack, since that ruling has not been put in issue by the petition.

Two further observations are pertinent to certain other statements made in this subdivision of Petitioner's brief.

First, it is again apparent that in spelling out the Two Points therein asserted as being presented by his petition, Petitioner's brief fails to establish any legal or factual basis for assuming that the doctrine of "non-delegable duty" is applicable to the maintenance of the McKenzie siding.

Second, Respondent is compelled to point to the inaccuracy of the statement made at page 6 of Petitioner's brief, that the Trial Court "submitted the case to the jury solely on the theory that what the foreman told the gang absolutely governed their relationship", for even a casual reading of the record and the Trial Court's employment instruction under attack, will readily disclose that neither the instruction as given, nor the uncontroverted evidence in the record material to that issue support the statement made.

Statement of Facts: While the statement of the facts contained in this subdivision of Petitioner's brief is accepted as being in the main substantially correct, Respondent must again point to the inaccuracy of the statement made at page 13 where the erroneous assertion made at page 6 thereof is again repeated, to the effect that the Trial Court submitted the employment issue to the jury "on the simple basis that Petitioner's employment status depended entirely upon what his foreman had told him, regardless of who controlled and supervised the work" — this statement is neither supported by the Trial Court's charge nor the material evidence on this issue in the record.

Certain facts relating to the issue of employment are emphasized here to reestablish the context in which the record discloses that these facts, as well as the Trial Court's instruction thereon, were presented for consideration by the jury.

The evidence is not in dispute that Petitioner was injured while he and the other members of Respondent's Chiefland section crew, on their regular Saturday "day off", were making repairs to a sidetrack owned by the M & M Turpentine Company, which connects with the Respondent's main line near Chiefland, Levy County, Florida, locally known and here referred to as the McKenzie siding, and that the members of

the section crew were all paid by the owner of the private sidetrack for this work.

While it was stipulated that the McKenzie siding was used in interstate commerce, it was uncontroverted that the Turpentine Company owned and had exclusive control of the use and maintenance of the siding, and that the occasional use by other local shippers was only by permission from the Turpentine Company. (R 64)

In testifying that he regularly inspected the McKenzie siding in the discharge of his normal railroad duties, Section Foreman Keen further stated without contradiction, that on finding that the siding needed repairs he so informed Mr. McKenzie, the president of M & M Turpentine Company (R 69, 70); that he and his section crew, including Petitioner, had on other occasions made repairs to the siding at McKenzie's request (R 69), who personally made the arrangements (R 66) and paid for the work when it was completed (R 66, 67); that McKenzie was present at the beginning of the work on the Saturday in question, pointed out the work to be done, and furnished the ties that were to be used in making the repairs (R 63, 64, 75); that he and his crew were always paid in cash by McKenzie for this work, rather than by the usual Coast Line check, and that McKenzie had the right to start and stop this work by the section crew (R 76, 77); that private transportation was used to get to the private work, whereas, a motor car was always used to get to and from the Respondent's work (R 70, 71); that no person connected with Respondent directed him to repair the siding. (R. 76)

The pivotal issue on which the jury found Respondent "not guilty" was whether Petitioner in fact actually knew, at the time of the injury complained of, that he was working for the Turpentine Company and not for the Respondent,

and had voluntarily agreed to do so. This being so, it was apparent that under the existing FELA decisions, Petitioner had no alternative but to deny these facts if his claim was to qualify under the statute. So it was that the only testimony given by the section crew which Petitioner contradicted, were their several statements to the effect that Petitioner on Friday had agreed with the other members of the section crew to repair the McKenzie siding on Saturday, in order to make some extra money; that none of the crew was required by the Respondent to do this work (R 56, 69, 73); and that prior to reporting for work on the McKenzie siding on the Saturday in question, the section crew, including Petitioner, were told by Foreman Keen that they would not be working for Respondent, but would be working for the Turpentine Company, and to be careful because Respondent would not be responsible for their safety (R 68-70, 195, 117).

Petitioner's denial of this testimony presented the jury with an irreconcilable conflict in the evidence on this issue, and it was on this conflict that the case was submitted to the jury by the Trial Court, based on the instruction hereafter set forth which made a clear-cut question of witness credibility for the jury to decide in arriving at a finding on this issue.

At page 13 of his brief, Petitioner has cited out of context a portion of the Trial Court's employment instruction, which Petitioner says was prejudicial; the record discloses that in context, the complete instruction, as well as the Trial Court's further explanatory instruction given to the jury after Petitioner's counsel objected to the first instruction, present a picture totally different from the impression suggested by the citation in Petitioner's brief, as to how the jury was charged on the issue of employment.

Because it is essential to an evaluation of whether or not the Trial Court's employment instruction was prejudicial to

Petitioner, the specific instruction, as given, as well as the remarks of counsel in connection therewith are here set forth in full (R 145-146, 151-153):

"In this case it has been stipulated in the record that the particular track being repaired on the morning when this accident occurred was a private track, not a track belonging to the Railroad, but was a private track, and you have heard the amount of conflicting testimony here as to whether or not this plaintiff knew that fact. But it is important for you to keep in mind that this was a private track and that it was the fact that the work was being done on this private track that raises the question as to whether or not plaintiff was in the course of his employment for the defendant at the time of the accident.

"Now, if the defendant Railroad, acting through its foreman, leased or hired its employees including plaintiff Ward to another employer without the plaintiff's knowledge or consent in the change of relationship, the defendant Railroad was not thereby replaced as the plaintiff's employer and was not thereby relieved from liability for injuries sustained by the plaintiff in the course of his employment.

"Now that is a legal phrase expressing the question and I think I can use other language that maybe can help you understand it better.

"The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went to work that morning. You can understand that if his foreman ordered him back to report for work on Saturday morning without explaining to him what he was going to do, or where he had to work, and he did report back and his foreman carried him off without letting him know any of the facts about what he was doing, the foreman as the Railroad employee and agent would make the Railroad Company liable for that act, even if the work was performed on a private

track. The evidence on that point is in conflict. All the Railroad employees testified that they all knew, including Ward, that that was a private job that they were going to perform that morning for the sake of making some extra money. Ward denies that. Ward says that nobody told him that he was going to work on a private track and that he wasn't working for the Railroad Company on that day. So that creates the issue that you have to decide on this question as to whether or not Ward was an employee of the Railroad on that occasion. The Railroad is liable, as I have told you, if the fact he was working on that private track was not disclosed to him and he was not afforded an opportunity to decline to work for a third party."

MR. RUTLEDGE: (Petitioner's Counsel) Your Honor, plaintiff objects to the Charge concerning the employment issue. It was my understanding you charged the issue was whether Ray Ward was told and instructed this was a private track. Now it is the plaintiff's contention that it must have been explained to Ward, or he must have understood before he was hurt, that he was working for a third party, not for the Railroad. The question was whether this was done before Ray Ward was hurt. The mere fact that Ward was told or knew the track was privately owned - - -

THE COURT: You are right about that if I said it that way.

MR. DELL: (Respondent's Counsel) I don't think you did, Your Honor.

MR. FAIRCLOTH: (Petitioner's Counsel) I think you said it that way.

THE COURT: Do you have the charge?

MR. RUTLEDGE: (Petitioner's Counsel) I have the note, that is the way I wrote it out. It is not very legible, but that is the way I wrote it out.

THE COURT: Bring the jury back.

(Jury in the box)

THE COURT: Members of the Jury, there is some confusion among counsel as to what I charged you with reference to the plaintiff's knowledge of what he was doing on the day he was injured and I called you back without taking the time to see specifically what I said, but to recharge you on that point.

I attempted to tell you that the Railroad Company was liable to this man for his injury, if he received an injury that day on that track, and there was any negligence in connection with the performance of his work. That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him; ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word you think I could use to make it any plainer?

MR. RUTLEDGE: (Petitioner's Counsel) Your Honor, to make it clear he was working for some third person and not working for the Railroad.

THE COURT: Yes sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have

to worry about all the other problems. You will retire and consider your verdict."

SUMMARY OF ARGUMENT

The real issue raised by the petition herein does not involve the Trial Court's instructions in this case, but rather relates entirely to Petitioner's contention that his employment status at the time he was injured is to be determined as a matter of law, on the theory that notwithstanding the circumstances under which the McKenzie siding was installed for the Turpentine Company, the maintenance of the McKenzie siding constituted a "non-delegable duty", the responsibility for which could not be assumed by the owner.

No decisions of any Federal or State Court have been found, nor are any cited in Petitioner's brief which hold that the doctrine of "non-delegable duty" should be applied to the maintenance of a purely private sidetrack. Rather, the decisions in this field have uniformly applied the test that the doctrine becomes applicable *only* when the evidence demonstrates that the function being performed by an injured employee was "essential to", or a "necessary incident" of a Railroad's operation, without which it could not properly operate. It is readily observable within the Railroad industry that sidetrack loading facilities are nearly everywhere provided by Railroads for the use of local shippers in rural areas, and that the installation of a private sidetrack in such areas is mainly for the convenience and accommodation of a single shipper who pays for, owns, and controls the use of such sidetrack, and in consideration of this service agrees to maintain it according to accepted railroad standards of inspection necessary to protect railroad equipment and personal furnishing this service. The evidence discloses that this circumstance is true of the private sidetrack in this case. It is only logical, therefore, that the maintenance of this siding,

and other such private sidetracks, where the use or non-use can have no practical effect on a railroad's overall function or operation, should not impose a "non-delegable" duty for maintenance on the Railroad furnishing such service to a shipper-owner.

Petitioner further contends that the Turpentine Company, in contracting to assume the maintenance of the McKenzie siding, became an agent of Respondent within the intendment of the FELA, thereby making Respondent liable to Petitioner for any injury he might have suffered while working thereon. Here again, as a part of and in support of this contention, the assumption is asserted that the maintenance of the McKenzie siding was a "non-delegable duty," which assumption is not warranted by the facts in this case nor supported by the rationale of the decisions cited in Petitioner's brief.

Finally, without regard for the material evidence in the record to the contrary, Petitioner, in contending that the Trial Court failed to properly charge the jury on the issue of employment, asserts as a premise for his contention the unwarranted assumption that Respondent had a "non-delegable duty" to maintain the McKenzie siding. An examination of the Trial Court's instructions relating to Petitioner's employment status at the time of his injury will disclose, as the Court of Appeals found, that there is no merit to this contention. Under the instruction given by the Trial Court, all circumstantial evidence relating to Petitioner's employment status at the time of his injury was resolved in Petitioner's favor, *and the case was submitted to the jury on the sole issue of whether or not Petitioner had in fact voluntarily agreed on his day off to accept other employment offered by the Turpentine Company to repair the siding,* in the course of which he was injured.

If there was error in the Trial Court's instruction to the jury on the issue of employment, the error was in Petitioner's favor, because under that instruction the jury was charged that the Respondent was liable unless Petitioner *knew* he was not working for the Respondent that morning, which put on Respondent the burden of proving that Petitioner was told and understood beforehand, that in repairing the McKenzie siding he would not be working for his regular "employer", the Atlantic Coast Line Railroad Company.

ARGUMENT

According to the decisions of the Federal Courts construing the FELA, a Railroad's liability under the statute for injuries suffered by an employee, exists only when there is employment at the time of the injury.[1] By the word "employment," as used in the statute, Congress has been held to have intended to describe the conventional relation of employer an employee, that is, connoting a contract or a rendering of service for compensation.[2]

The courts have further held that "when" employment exists raises a question of law, the basic test for which is whether the function being performed by the employee at the time he is injured was a necessary operational activity of the Railroad, without which it could not properly func-

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(1) Robinson v. Baltimore & O. R. R., 237 U. S. 84, 59 L. ed. 849, 35 S. Ct. 491 (1915).
Chicago, Rock Island & Pac. Ry. v. Bond, 240 U. S. 449, 60 L. ed. 735, 36 S. Ct. 403 (1916).
Dougall v. Spokane, P. & S. Ry. Co., 207 F. 2d 843 (CA9, 1953), cert. denied, 347 U. S. 904, 98 L. ed. 1063, 74 S. Ct. 429.

(2) Robinson v. Baltimore & O. R. R., supra Note 1.
Dougall v. Spokane, P. & S. Ry. Co., supra Note 1.

tion;[3] and that "for whom" work is being performed is held to raise a question of fact for the jury.[4]

POINT I.

NO NON-DELEGABLE DUTY FOR MAINTENANCE OF PRIVATE SIDETRACKS.

The evidence in the record discloses that the McKenzie siding was on private property owned by the Turpentine Company, which had exclusive control of the use and maintenance of the siding; that Petitioner knew this; that Petitioner and the section crew were paid by the Turpentine Company, which had the right to start and stop the work; that Respondent had no legal obligation for maintenance; and that no person connected with Respondent directed that the siding be repaired. On these facts, Petitioner has attempted to establish that the Court of Appeals' judgment in this case conflicts with and should be controlled by the rationale of this Court's decision in the Sinkler [5] and Baker [6] cases, and the decision of the Sixth Circuit Court of Appeals in the Margue[7] case.

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[3] Sinkler v. Missouri-Pacific R. R. Co., 356 U. S. 326, 2 L. ed. 2d 799, 78 S. Ct., 758 (1958).
Baker v. Texas & Pacific Ry. Co., 359 U. S. 227, 79 S. Ct. 664, 3 L. ed. 2d 756 (1959).
Erie Ry. Co. v. Margue, 23 F. 2d 664 (CA6, 1928).

[4] Dougall v. Spokane, P. & S. Ry. Co., supra Note 1.
Shaw v. Monessen S. W. Ry. Co., 200 F. 2d 841 (CA 3, 1953).

[5] Sinkler v. Missouri-Pacific Railroad Company (1958), 356 U. S. 326.

[6] Baker v. Texas and Pacific Railway Co., (1959), 359 U. S. 227.

[7] Erie R. Co. v. Margue (CA 6, 1928), 23 F. 2d 664.

It becomes readily apparent from the decisions in the Margue and Baker cases, and the related cases therein cited, that all of these cases can be distinguished, for it appears from the pertinent facts that each have two factual elements in common as the basis for the rationale of the several Courts decisions, which are not present in this case, that is:

(1) in each case the *Railroad* had hired the independent contractor involved; and

(2) in each case the *Railroad* had delegated to the independent contractor hired, the performance of a function which was "essential" to or a "necessary incident" of the Railroad's operation, without which the Railroad could not properly function.

In the Margue case, the Railroad hired a construction company to maintain the Railroad's tracks, roadways and structures, using its own employees with the Railroad furnishing certain tools, train equipment and services, in the course of which one of the Railroad's trains struck an employee of the construction company. In finding for the construction company's employee, the Sixth Circuit Court of Appeals held that the maintenance of the Railroad's main line "was essential to the exercise of its franchise rights," the responsibility for which the Railroad could not avoid under the FELA. The Court recognized, however, *that there might be special services* which the Railroad itself was not legally bound to perform, and that such special services properly could be delegated to a third party without the Railroad becoming liable to the third party's employees injured in the course of such work.

In the Baker case, the Railroad had employed a construction company to strengthen and stabilize its main line right-of-way, in the course of which an employee of the construction company was struck by one of the Railroad's trains. The only issue on review was whether the case should have been

submitted to the jury on the question of employment; and all this Court held in granting the Petition was that the employee had shown facts sufficient to raise a jury issue, which should have been submitted to the jury under appropriate instructions.

The facts in the Baker case show that the Railroad "hired an independent contractor" and by contract "delegated an essential function" of strengthening and stabilizing the Railroad's main line right-of-way. Since the only issue in the Baker case was "denial of trial by jury," and considering that the factual elements involved in both the Margue and Baker cases are not present in this case, these cases are not in point and do not support the Petition.

OWNER OF PRIVATE SIDETRACK NOT RESPONDENT'S AGENT

Petitioner relies on the Sinkler case to establish, by inverse analogy, that in assuming the maintenance of its own sidetrack the Turpentine Company, for which Petitioner had voluntarily agreed to work, became "an agent" of Respondent within the broad interpretation given the word "agency" under the FELA, and that therefore in some fashion Respondent became liable to Petitioner for the injuries which he suffered while working for the Turpentine Company.

The sole issue before this Court in the Sinkler case was whether the Terminal Company which injured an employee of the Railroad, was "an agent of the Railroad" within the meaning of the FELA. The rationale of the majority opinion finding that such "agency" did exist, was based on the fact that "switching it a vital operational activity of railroading:"

> "We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others

performing, under contract, *operational activities of the employer,* such others are 'agents' of the employer within the meaning of Section 1 of the F.E.L.A."
(emphasis supplied)

In attempting to establish an analogy with the Sinkler case Petitioner has either overlooked or ignored the basic factual dissimilarity:

In the Sinkler case, the switching work being performed by the Terminal Company was, by its nature, a "vital operational activity" of that Railroad.

In this case the maintenance of the McKenzie siding can hardly in reason or logic be deemed to be "vital" to Respondent's operations.

Since the decision in the Sinkler case was based on an independent contractor performing a "vital operational activity" for the Railroad, this decision is not relevant under the facts peculiar to this case, and does not support the petition. If the analogy is carried to its logical conclusion, it would appear that had the Turpentine Company hired non-Railroad labor to repair the McKenzie siding, such persons should be held to be working as Railroad employees for the purpose of imposing liability under the FELA, notwithstanding that in this situation Respondent would have no knowledge of such employment nor the opportunity or right to exercise any control over such "quasi-employees."

Such reasoning produces an absurdity. Neither analogy is sufficient on the facts peculiar to this case to establish an "employer-employee" relation within the accepted definition and intended application of this term under the FELA decisions.

NO SCHEME OR DEVICE SHOWN

It is further charged that the whole factual circumstance under which the section crew undertook from time to time

to repair private sidings on their "days off," in order to make extra money, was nothing more than a "scheme or device" on the part of Respondent to avoid its rightful burden and responsibility under the FELA for injuries suffered by such employees while performing this type of work. It is a little difficult to believe that either Petitioner or his Counsel have any real conscientous conviction that the officials of the Railroad Company conceived and put into effect any such "scheme or device" as suggested at page 29 of Petitioner's brief, and therefore conclude that this charge is merely the result of zealous advocacy on the part of Counsel.

It is further asserted that the alleged "scheme or device" is established by the circumstantial evidence that the railroad foreman used his regular section crew, "working them under his control and supervision, using railroad tools, paying the men off at their railroad rate of pay," and "telling them all the time that they were not working for the Railroad and the Railroad would not be responsible if they got hurt." In stating these circumstances, Petitioner's brief makes no effort to reconcile the other material uncontroverted evidence that Respondent had no legal duty to maintain or repair the McKenzie siding, that the *only* duty that Respondent's Operating Rules placed on its section foreman for private sidetracks was that of inspection, and that the responsibility for all repairs and maintenance of the McKenzie siding was that of the Turpentine Company which paid for and had the sole authority to start or stop this work.

POINT II.
JURY PROPERLY INSTRUCTED ON EMPLOYMENT ISSUE

In considering whether or not the Trial Court's instruction on the issue of employment was prejudicial, as Petitioner contends, the first inquiry is here addressed to the pri-

mary evidence which establishes "for whom" Petitioner was working at the time he was injured.

There was considerable testimony given by the witnesses for both parties relating to the tools used, normal duties performed and the regular pay of the section crew. While Petitioner's brief has over-emphasized this testimony to the exclusion of other testimony on this issue, it is apparent from an examination of the record that the single over-riding fact on this issue was whether or not Petitioner was told before going to work on the McKenzie siding, that he would be working for the Turpentine Company, and not for Respondent, and that he *voluntarily* agreed to undertake the work in order to make some extra money on his "day off."

The entire evidence on this issue came from the testimony of the members of the section crew who all confirmed the fact that Petitioner, and they, were told that he and they would be working for the Turpentine Company, and not for the Respondent, and that he and they voluntarily agreed to repair the McKenzie siding in order to make some extra money. These facts Petitioner categorically denied at the trial.

This direct conflict between Petitioner's testimony and the testimony of the other witnesses, made a clear issue for the jury—that is, whether to believe Petitioner or his co-workers. This issue was peculiarly a matter within the sole and exclusive province of the jury, and not one on which the Trial Court should or could properly find for employment as a matter of law, as Petitioner contends.

> *Baker* v. *Texas & Pacific R. Co.*, supra, where this Court, quoting from *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 88 L. ed. 520, 525, 64 S. Ct. 409, said:
>
> "The very essence of * * * (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

That determination having been made in this case by the jury in favor of the Respondent and against the Petitioner, based on probative facts which amply support that finding, this Court should not re-examine the evidence and reach a conclusion different from that reached by the jury.

Byrne v. *Pennsylvania R. R. Co.*, 262 F. 2d 906 (CA 3, 1959); cert. denied, 359 U. S. 960, 3 L. ed. 2d 766, 79 S. Ct. 798 (1959).

It is axiomatic that if Petitioner in fact was told, before going to work, that he would be working for the Turpentine Company and not for Respondent on that Saturday, and that he voluntarily agreed to help repair the McKenzie siding in order to make some extra money, then he had in fact and law thereby established a "conventional employee-employer" relation with the Turpentine Company to render service for compensation.

Since this evidence would fully determine the question of employment, and inasmuch as the Trial Court charged the jury that Petitioner must have had "actual knowledge" that he was working for the Turpentine Company and not Respondent, before the jury could find for the Respondent on the employment issue, there was no necessity or reason for the Trial Court to consider or give Petitioner's requested instructions 2, 4 and 5. The matters of evidence that the jury would be required to consider under those instructions had, at that point in the trial, no material probative weight or value in determining any issue in the case.

The cases cited in Petitioner's brief in support of his contention on this issue can be readily distinguished, as the facts in each show that either there was no question as to whether the employee was performing an "essential operational activity" of the Railroad, or that the issue was decided under "the loaned servant doctrine," where the evidence showed that the employee had no knowledge or had not

acquiesced in the change of employer, or under "the incident of employment doctrine," where the evidence established that what the employee was doing at the time of injury was a necessary incident of his regular employment.

Under the state of facts peculiar to the McKenzie siding in this case, the Trial Court's instruction to the jury on the issue of employment was both supported by the evidence and legally sufficient, and under it the jury could properly find that Petitioner was not Respondent's employee at the time Petitioner was injured, and that Respondent was not liable for the consequences of such injury.

CONCLUSION

Peitioner has had his day in Court, including a trial by jury under instructions which gave him the benefit of every circumstance on the burden of proof of employment.

The facts in this case and the rationale of the authorities cited in Petitioner's brief compel the same logical conclusion so ably stated by the Court of Appeals in its judgment:

> "Similarly, in the present case, we hold that Atlantic Coast Line was not restrained by law from declining the responsibility of maintaining the McKenzie siding.
>
> * * *
>
> "We therefore conclude that the Sinkler decision does not warrant an abandonment of the conclusion, which we reach on principle and authority, that either there was no duty on appellee to care for this private siding or if there was, it was a duty which appellee could lawfully delegate to others.
>
> "To sum up what we have said in the foregoing discussion, the trial court correctly refused to rule that appellant was injured in the course of employment for appellee, because the appellee's evidence raised an issue of fact on a point which was capable of outweighing all of the

evidence pointing in appellant's favor, and because there was nothing which prevented or rendered illegal an agreement permitting a third party to assume responsibility for this maintenance and repair and to hire anyone, including appellee's regular employees, to discharge this task. Second, (fol. 468) with the issue properly reduced to the factual question whether appellee had or had not hired appellant to do this work, the court committed no reversible error in refusing to submit this issue to the jury's consideration by charging them as to the criteria which are usually applied in determining which of two parties is a given individual's employer at a given moment." (R 175, 177).

The application of the "FELA" decisions cited to the evidence peculiar to this case demonstrates that there is no conflict between those decisions and the judgment of the Court of Appeals under attack, nor has Petitioner shown wherein he has been prejudiced in any of his rights as a litigant. The petition should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 485.—October Term, 1959.

Raymond P. Ward, Petitioner,
v.
Atlantic Coast Line R. Co.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 18, 1960.]

Per Curiam.

In this action under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51–60, the Court of Appeals for the Fifth Circuit, by a divided court, affirmed a judgment in favor of the respondent railroad entered on a jury verdict in the District Court for the Northern District of Florida. 265 F. 2d 75. We granted certiorari, 361 U. S. 861, to consider the issues presented in the light of our decisions in *Sinkler* v. *Missouri Pacific R. Co.*, 356 U. S. 326, and *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227. The latter is an intervening decision.

The railroad employed the petitioner as a laborer in a section gang with a regular work-week from Monday through Friday. The petitioner was injured on a Saturday, ordinarily the gang's day off, when the gang, supervised by their foreman, using the work tools supplied by the railroad, and following standard railroad methods for doing the work, were replacing ties under a siding track which ran off the railroad's main line tracks to the plant of the M. & M. Turpentine Company. That company had an agreement with the railroad calling for the railroad to make periodic inspections of the track and for the repairs disclosed to be necessary by such inspections to be made by and at the expense of the Turpentine Company "to the satisfaction of the [railroad's] chief engineer." When an inspection revealed the need

for the work in question, the Turpentine Company engaged the petitioner's foreman to recruit his crew to do the work on their day off under his direction. The foreman offered the crew railroad overtime rates of pay for doing the work, but there is a sharp conflict in the evidence whether he told the crew that they would not be working for the railroad but for someone else. The foreman paid the wages with funds supplied to him by the Turpentine Company.

The petitioner contends that the proofs require a holding as a matter of law that the Turpentine Company, in the maintenance of the siding, was the "agent" of the respondent railroad within the meaning of § 1 of the Federal Employers' Liability Act, 45 U. S. C. § 51, as we construed that term in *Sinkler* v. *Missouri Pacific R. Co., supra.* We find no merit in this contention. Indeed, we do not think that the proofs presented a jury question whether the Turpentine Company was the railroad's "agent" within the meaning of the Act. This was not a situation, as in *Sinkler,* in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise. This was a siding privately owned by the Turpentine Company and established to service it alone. In maintaining it, we do not see how it can be said under the proofs that the Turpentine Company was "engaged in furthering the operational activities of respondent." *Sinkler* v. *Missouri Pacific R. Co., supra,* at 331. Even the use of the siding by local farmers in harvest time to load respondent's cars with watermelons, a fact heavily relied upon by the petitioner, was, according to uncontradicted testimony, not at the instance of the railroad but because the President of the Turpentine Company "leased this track—I guess that is what you would call it—anyhow, he let those farmers load watermelons out there on that track and he always repaired it every year before watermelon time."

However, we agree with the petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by the petitioner,[1] and in giving the instructions he did,[2] as to the factors to be considered by

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[1] The requested instructions were the following:

"One of the issues to be decided in this case is whether or not the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured. This issue must be determined from all of the circumstances of the case. The primary factor to be considered is whether or not the railroad had the power to direct, control, and supervise the plaintiff in the performance of his work at the time he was injured. Other relevant factors to be considered are: who selected and engaged the plaintiff to perform the work; who furnished the tools with which the work was performed; who paid the plaintiff his wages for the performance of the work; the amount of scale of such wages; and who had the power to fire or dismiss the plaintiff from the work.

"If you find that the railroad, through its foreman, I. H. Keen, had the power to direct, control and supervise the plaintiff in the performance of the work he was doing at the time he was injured, then you should find that the plaintiff was employed by the defendant railroad at the time he was injured.

"The fact that the money used to pay the plaintiff Ward for the work he was doing at the time he was injured came originally from some third person with whom the railroad or the owner of the spur track had made an arrangement, does not remove the defendant railroad from its employer-employee relationship with the plaintiff Ward and does not relieve the defendant railroad of liability for injuries suffered by the plaintiff during the course of his railroad employment as a result of the defendant railroad's negligence.

"The accident here involved occurred upon a spur track which was partly owned by the M. & M. Turpentine Co. The fact that the M. & M. Turpentine Co. had contracted with the defendant railroad to maintain all or a portion of this spur track does not relieve the defendant railroad of its liability to the plaintiff if the plaintiff was injured during the course of his employment with the defendant railroad on the spur track as a direct consequence, in whole or in part, of the defendant railroad's negligence."

[2] The pertinent portion of the court's charge was as follows:

"That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning

the jury in determining whether the petitioner was an "employee" of the railroad during the performance of the work within the meaning of the Act. The instructions given in effect limited inquiry to the question whether the petitioner was aware that the railroad considered him not to be working for it but for some third party. But neither the railroad's communication of its concept of petitioner's status to petitioner, nor his acquiescence therein, if shown, is determinative of the issue. Cf. *Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575, 578. The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d, § 220 (2)(i), and the issue is one for determination by the jury on the basis of all the relevant factors. *Baker* v. *Texas & Pacific R. Co.*, *supra*.

Reversed.

MR. JUSTICE FRANKFURTER would dismiss this writ of certiorari as improvidently granted. As the Court's opinion demonstrates, the case solely presents the appro-

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that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to get out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?

"Mr. Rutledge: Your Honor, to make it clear he was working for some third person and not working for the Railroad.

"The Court: Yes, sir, that is the word I believe be suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable."

priateness of instructions given by a trial court and the refusal of requested instructions in the light of the unique circumstances of a particular situation. As such it falls outside the considerations which, according to Rule 19 of this Court, govern the granting of a petition for certiorari. See *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 524 (dissenting).

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITTAKER joins, dissenting.

Since I consider that, except as to the one issue submitted to the jury, there is no evidence in the record tending to establish any of the usual criteria showing an employment relationship between the petitioner and the respondent in connection with this work, I dissent. See Restatement, Agency 2d, § 227, Comment a.